CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 115

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO, PETITIONER,

vs.

HORACE HAVEMEYER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 8, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1933

No. 2905

HORACE HAVEMEYER et al. (RUSSELL & Co., Sucrs., S. en C.), Appellants,

v.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO et al., Appellees

TRANSCRIPT OF RECORD—Filed in Circuit Court of Appeals by Leave of Court March 13, 1934

IN THE SUPREME COURT OF PUERTO RICO

No. 5401

HORACE HAVEMEYER et al., as Partners of the Civil Agricultural Partnership Russell & Co., Sucrs., S. en C., Appellants,

v.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO and the MUNICIPALITY OF LAJAS, Appellees

On Appeal from the Supreme Court of Puerto Rico to the United States Circuit Court of Appeals for the First Circuit

IN DISTRICT COURT OF SAN JUAN, PUERTO RICO

PETITION FOR APPEAL—Filed April 8, 1929

Now come Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and [fol. 2] Henry B. Orde, members of the civil agricultural partnership of Puerto Rico, Russell & Co., Sucrs., S. en C., and hereby appeal to this Honorable Court from the order rendered and entered by the Public Service Commission of Puerto Rico notified on March 9, 1929, in case J2763, can-

celing that part of franchise number 5 decreed and granted by the former Executive Council of Puerto Rico on March 19, 1901, to the Guanica Land Company which refers to the use of certain waters from Guanica Lake for purpose of irrigation; and the appellants allege:

First. That Russell & Company, Sucrs., S. en C., is a limited civil agricultural partnership; that Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, the appellants herein, are the sole members of said partnership and that as such members the said appellants are the owners by purchase of that part of franchise number 5 granted by the Executive Council of Puerto Rico on March 19, 1901, to the Guanica Land Company which refers to the use of certain waters from Guanica Lake for purposes of irrigation, the said franchise being entitled: "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica." The said franchise is accompanied to this petition for appeal and a true copy of same is made a part thereof as "Exhibit A".

That Horace Havemeyer and Edward S. Paine are citizens of the United States and citizens and residents and domiciled in the State of New York; that Frank M. Welty and Edwin L. Arnold are citizens of the United States and citizens and residents and domiciled in the State of Ohio; that Frank A. Dillingham is a citizen of the United States and a citizen and resident and domiciled in the State of New Jersey; that H. B. Orde is a citizen of Great Britain and a citizen and resident and domiciled in Canada; that Horace Havemeyer, Frank A. Dillingham and Edward S. Paine are managing partners and that Edwin L. Arnold, H. [fol. 3] B. Orde and Frank M. Welty are silent partners of the partnership Russell & Company, Sucrs., S. en C.

Second. That under date of May 26, 1928, the Public Service Commission of Puerto Rico issued an order to show cause, addressed to Russell & Company, Sucrs., S. en C., Ensenada Estates, Inc. and its assignees, Guanica Central and its assignees, and to any other person or legal entity which might have acquired any rights, by grant or purchase, in the franchise mentioned in the first paragraph of

this petition, and ordering them to appear before the said Public Service Commission to show cause why the said franchise should not be totally canceled; that a true copy of said order to show cause is accompanied to this petition as a part thereof as "Exhibit B".

Third. That the Municipal Assembly of Lajas, on the 24th of February, 1928, adopted a resolution an exact copy of which is joined to this petition as "Exhibit C"; that the said resolution was approved by the Mayor of Lajas on February 27, 1928, and a copy thereof was forwarded to and received by the Public Service Commission.

That under date of May 22, 1928, the Governor of Puerto Rico wrote and forwarded to the president of the Public Service Commission of Puerto Rico a letter enclosing another letter from the Commissioner of the Interior of Puerto Rico; that a true copy of said letter from the Governor and of the enclosed letter from the Commissioner of the Interior are accompanied to this petition as a part thereof as "Exhibit D".

That said resolution (Exhibit C) and said letters (Exhibit D) were the only complaints filed with the Public Service Commission with regard to the cancellation of the above franchise and that the same constitute the original complaints on which the Public Service Commission rendered and entered the order appealed from, dated March 9, 1929.

Fourth. That subsequently, on or around the 27th of November, 1928, the appellants (with the exception of Edward S. Paine, who was not a member of Russell & Company, Sucrs., S. en C.), especially appeared before the [fol. 4] Public Service Commission of Puerto Rico and alleged want of jurisdiction on the part of the Public Service Commission to cancel the said franchise and presented a motion to dismiss the said proceedings for lack of jurisdiction. That a true copy of said special appearance and of the motion to dismiss the case is joined to this petition and made a part thereof as "Exhibit E". That at the time the said motion was presented a quorum of the members of the Public Service Commission was not present in the session room, and the president of said Commission requested from the appellants to file an answer to the order to show cause (Exhibit B) without admitting the jurisdiction of the Commission and without waiving their special appearance and

motion to dismiss, which latter motion would be considered and decided later by the Commission, and the appellants acquiesced to the said request, but the Public Service Commission has never passed on said motion.

Fifth. That without waiving their motion to dismiss and without accepting the jurisdiction of the Public Service Commission, the appellants (except Mr. Paine) on November 27, 1928, presented to the Public Service Commission an answer to the order to show cause of May 26, 1928 (Exhibit B), a faithful copy of which answer is joined to this petition and made a part thereof as "Exhibit F".

Sixth. That the Public Service Commission held several public hearings in case J2763, relative to the cancellation of the franchise, Exhibit A; that the complainants produced evidence to prove their complaints, as well as the order to show cause, dated May 26, 1928, and the appellants also adduced evidence in support of their answer and in opposition to the cancellation of said franchise. That the municipality of Guanica appeared besides as intervenor in opposition to such cancellation. That on March 9, 1929, the Public Service Commission rendered and entered an order canceling that part of the franchise mentioned, which refers to the use of certain waters from Guanica Lake for purposes of irrigation, and the said order was served on counsel for the appellants on March 9, 1929. This order is the one appealed from herein and from said order and from the re-
[fol. 5] port of the president of the Commission mentioned in said order, exact copies are joined to this petition, as a part thereof, marked "Exhibit G".

Seventh. That the Public Service Commission committed the following errors in rendering and entering the said order of March 9, 1929, as well as in the proceedings had in case J2763 wherein the said order appealed from was entered, to wit:

1. The Public Service Commission erred in ordering the cancellation of that part of franchise number 5 granted by the Executive Council of Puerto Rico to the Guanica Land Company, which refers to the use of certain waters from Guanica Lake for purposes of irrigation.

2. The Public Service Commission erred in holding that it has power or jurisdiction to totally or partially cancel

franchise number 5 granted to the Guanica Land Company on March 19, 1901, by the Executive Council of Puerto Rico.

3. The Public Service Commission erred in not holding that the Congress of the United States has the exclusive power, authority and jurisdiction to cancel or revoke Franchise Number 5, granted to the Guanica Land Company by the Executive Council of Puerto Rico on March 19, 1901.

4. The Public Service Commission erred in not holding that it lacks jurisdiction over these appellants because they are not, nor form a part, of any public service corporation or partnership.

5. The Public Service Commission erred in not holding that it lacked jurisdiction to consider this proceeding.

6. The Public Service Commission erred in not sustaining the motion of these appellants to dismiss the proceedings for the cancellation of franchise number 5, granted on March 19, 1901, to the Guanica Land Company by the Executive Council of Puerto Rico, as to these appellants.

7. The Public Service Commission erred in holding that there are sufficient grounds to justify the cancellation of that part of franchise number 5 of March 19, 1901, which refers to the use of certain waters of Guanica Lake for purposes of irrigation.

8. The Public Service Commission erred in holding that [fol. 6] the appellants have not complied with the obligations imposed by franchise number 5 of March 19, 1901.

9. The Public Service Commission erred in not holding that the power to cancel franchise number 5 of March 19, 1901, exists solely when there is a breach of obligations imposed by the franchise, of such a serious nature that the cancellation is necessary, and that such right does not depend on the whim of the Commission.

10. The Public Service Commission erred in not holding that the remedy of a suit for damages provided by Section IV of the franchise of March 19, 1901, is the sole remedy of the complainants or other person who has suffered damages by reason of the floods in the Lajas region.

11. The Public Service Commission erred in not demanding from the appellants the fulfilment of their obligations, in accordance with franchise number 5 of March 19, 1901, instead of canceling the same.

12. The Public Service Commission erred in holding that the floods in the valley of Lajas were caused by the acts or by the negligence of the appellants.

13. The Public Service Commission erred in not holding that the floods of the valley of Jajas and the high level of the waters of Guanica Lake were caused by torrential and extraordinary rains and by an act of God (vis major).

14. The Public Service Commission erred in holding that the works done by the appellants within the bed of Rio Loco, as well as other innovations made by them in the bed of the river, and the works made, have contributed to the flow of a greater volume of water in the Guanica Lake than that formerly flowing in.

15. The Public Service Commission erred in holding that Negros Pond was at any time completely closed up or eliminated.

16. The Public Service Commission erred in holding that the appellants have interest in keeping the level of Guanica Lake as high as possible.

17. The Public Service Commission erred in holding that the appellants have raised or kept the level of the waters of [fol. 7] Guanica Lake above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall.

18. The Public Service Commission erred in holding that in accordance with the terms of franchise number 5 of March 19, 1901, the appellants were bound to know and to keep a fixed level above which they should not have allowed the waters of Guanica Lake to raise, unless this was caused by extraordinary rains.

19. The Public Service Commission erred in holding that the appellants should be presumed to be responsible of the consequences ensuing from the high level of the waters of Guanica Lake, unless the appellants show the contrary in a conclusive manner to the Commission.

20. The Public Service Commission erred in holding that the Commission must presume that the high level of the waters of Guanica Lake and the floods in the valley of Lajas could not have occurred without the consent and knowledge of the appellants.

21. The Public Service Commission erred in taking into consideration for entering the order appealed from, the alleged fact that franchise number 5 of March 19, 1901, has caused difficulties to said Commission, as well as to the Insular Government.

22. The Public Service Commission erred in not holding and deciding that the steps taken by the appellants to lower the level of Guanica Lake and to keep said level are sufficient to maintain said waters at the customary level thereof during years of average and usual rainfall and sufficient besides to avoid further floods in the valley of Lajas.

23. The Public Service Commission erred in not making an ocular inspection in accordance with the motion presented by the Municipality of Guanica, before entering the order appealed from.

24. The Public Service Commission committed other errors in rendering the order appealed from as well as in the proceedings had in case J-2763 before the said Commission, such errors appearing from the face of said order and proceedings.

Eighth. That a sworn statement of the attorney for the appellants to the effect that this appeal is not taken with [fol. 8] the object of delaying this cause but because the said appellants and their counsel verily believe that grave injustice and error have been committed, is joined to this petition as a part thereof and marked "Exhibit H".

Ninth. That the order of the Public Service Commission of Puerto Rico dated March 9, 1929, appealed herein, is unreasonable, abusive, arbitrary and illegal and is founded on inadmissible evidence, and that said order is not in accord with the law; that the same constitutes a taking of the property of the appellants without due process of law, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and of the provisions of an act of the Congress of the United States of March 2,

1917; that said order constitutes besides a taking of the private property of the appellants for public purposes without just compensation, in violation of the Fifth Amendment of the Constitution of the United States and of the provisions of an act of the Congress of the United States of March 2, 1917; that the said order constitutes, furthermore, a violation of the provisions of an act of the Congress of the United States of April 12, 1900, and that the same should be reversed.

For the foregoing reasons the appellants pray that this appeal be admitted and allowed and that a final decree be entered reversing the order of the Public Service Commission of Puerto Rico, rendered and entered March 9, 1929, in case J2763 (Exhibit G), with costs, disbursements and attorneys' fees to the appellants herein.

San Juan, Puerto Rico, April 8, 1929.

O. B. Frazer, Attorney for the Appellants.

Duly sworn to by O. B. Frazer. Jurat omitted in printing.

[fol. 9] [File endorsement omitted.]

EXHIBIT "A" TO PETITION

A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of its Lands, and also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica.

The Executive Council of Puerto Rico does hereby ordain and enact:

I. That the Guanica Land Company (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns, be and they are hereby authorized and empowered to erect, construct, maintain and operate a dam of masonry work or other proper materials across the Cano Negro, or outlet

from the Lake of Guanica, in the municipality of Yauco and upon such lands of abutting owners as may have been acquired by consent or by process of law, for the purpose of [fol. 10] retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said lake, through the said cano or otherwise, for the purposes hereinafter set forth.

II. That the said Company and its successors and assigns be and they hereby are authorized to take from the said Lake of Guanica, or from the said cano or outlet, such quantity of water not exceeding 20,000,000 gallons during each day, as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased by the said Company, or by its successors or assigns, or any of them. The water so to be taken from the said lake or cano may be taken from such part or parts thereof, adjacent or contiguous to said lands, as the said Company or its successors or assigns may see fit, and may be taken by gravity through proper channels, or by pumps, or by any other method that may be advisable, or by any two or more of such methods.

III. That the said company and its successors and assigns may erect, construct, operate and maintain upon those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said cano, or within twenty meters of the shore of the said lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters; provided, that no public road lying within or partly within said limits shall be obstructed to any extent whatever thereby.

IV. That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said Lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said lake, or by unduly lowering the level of the waters of said lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie [fol. 11] against said Company, its successors and assigns

for such damage by such abutting owners, in any court of competent jurisdiction.

V. That the Guanica Land Company and its successors and assigns be and they hereby are authorized and empowered to construct, maintain and operate a line of standard gauge railway of one meter in width, with proper sidings, switches and other appurtenances, upon and along those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said Cano Negro, or within twenty meters of the shore of the Lake of Guanica or of the Harbor or Bay of Guanica.

VI. That the railway so to be constructed and operated shall be well substantially built and shall be used for the transportation of the cattle, crops, and other goods and effects owned by the said company, or its successors or assigns and of its and their agents and employees; provided, that nothing herein in this clause contained shall be held or construed to give said Company, its successors or assigns the right to transport the crops, goods and effects of any other person, firm or corporation for hire.

VII. That no part of any public road or way lying within or partly within the limits aforesaid shall be occupied or obstructed by the said railway, except in so far as may be required to allow the same to cross and recross such road or way where necessary; all such crossing shall be at all times maintained by the said company and its successors and assigns, under such condition as may be satisfactory to the Commissioner of the Interior, and in case said Company shall fail or refuse to follow the instructions of said Commissioner in respect to such crossings, said crossing or any of them, whether now existing or hereafter created may be put by the Commissioner of the Interior in such condition as he may find satisfactory and the cost thereof shall become and be a first lien upon the property and assets of said Company, to be enforced in a court of competent jurisdiction as other liens may be enforced.

VIII. That the said Guanica Land Company and its suc-
[fol. 12] cessors and assigns be and they hereby are authorized and empowered, the consent of the United States, through its Secretary of War having been first obtained, to erect, construct, maintain and operate a dock or wharf in

the harbor or bay of Guanica upon lands now or hereafter owned, leased or controlled by it or them, and upon lands under water adjacent thereto, with such approaches as may be satisfactory to the Commissioner of the Interior.

IX. That the wharf or dock so to be constructed and maintained shall be well and substantially built, and shall be of sufficient size and length to allow of its use by steamers and vessels for the purpose of receiving and discharging the goods, chattels and effects of the said Company and its successors and assigns, and for the debarkation and embarkation of its or their officers, agents and employees; nothing, however, in this section contained, shall be held or construed to give said company, its successors or assigns the right to permit the use of said wharf or dock by steamers or vessels of any other person, firm or corporation whatever, for hire or otherwise, for any purpose, and especially for the purpose of receiving or discharging goods, chattels and effects of any other person, firm or corporation, nor shall such section be held or construed to give said company, its successors or assigns, the right for hire or otherwise, to receive or discharge in its own vessels or the vessels of any other person, firm or corporation, goods, chattels and effects belonging to any other person, firm or corporation.

X. That if the said wharf or dock shall extend to or cross any public road or way along the shores of the said harbor of Guanica, the said Company, its successors and assigns shall at all times construct and maintain such approaches on either side thereof as shall be satisfactory to the Commissioner of the Interior, and at any time hereafter the said Commissioner may direct alterations or repairs or changes in said approaches, which shall be made by said Company, its successors and assigns; and in the event of the failure of the said Company, its successors or assigns to make such changes, repairs or alterations within a reasonable time, the same may be made by the Commissioner of [fol. 13] the Interior, and the cost therof shall be charged against said Company, its successors and assigns as a first lien upon all of its property and assets, said lien to be enforced by process of law as other liens are enforced.

XI. That the said Company and its successors and assigns are hereby authorized to construct and maintain such

other works as may be necessary for the proper operation of the said dam, channel, pipe lines, pumping stations, railway and wharf or dock or any of them.

XII. That the said Guanica Land Company and its successors and assigns shall at all times allow without compensation the use of the said railway and wharf to the Federal and Insular Government for the transportation and embarkation of their troops and employees and military and other stores; provided, that the free use of the said railway and wharf by the said Company and its successors and assigns shall not be obstructed or impeded thereby, except in time of war.

XIII. The Guanica Land Company and its successors and assigns are hereby authorized, subject to the approval of the Commissioner of the Interior, to enter upon and occupy so much of the public and private lands as may be reasonably necessary for the purpose of making surveys, determining and laying out routes of lines, and performing all other acts necessary in connection with the exercise of the powers herein granted, and each and all of them, and shall have power to acquire by eminent domain such private lands as may be required for the works authorized herein, as now or hereafter determined upon, in the manner now or hereafter provided by the laws applicable in such cases.

XIV. Before any of the work herein authorized shall be begun, the plans for the same shall be submitted to and approved by the Commissioner of the Interior for the Island of Porto Rico, and all material and construction shall be subject to inspection by him and his agents. After such plans shall have been approved by the said Commissioner no material change or modification shall be made therein, unless the same shall be authorized or directed or [fol. 14] approved by the Executive Council, or by the said Commissioner or his agents.

XV. Acceptance of the franchise, privileges, concessions and rights granted herein and hereby shall be made by the Guanica Land Company, or by its successors or assigns by filing with the said Executive Council a written acceptance within ninety days after the approval hereof by the Governor of Porto Rico, and work shall be begun within

sixty days from such written acceptance, and be completed within one year thereafter.

XVI. In addition to the general taxes at any time laid or imposed upon the said Guanica Land Company or its successors and assigns, it and they shall pay to the Treasurer of Porto Rico, as consideration herefor, the sum of three hundred dollars annually, the first payment to be made at the time of filing the acceptance hereof as hereinbefore provided, and each further payment to be made at the expiration of each succeeding year thereafter; provided, that upon the failure of the said company, its successors or assigns, for a period of thirty days, to make the payment herein provided, the Commissioner of the Interior is authorized to stop the flow of water from said lake through the canal and other channels of said company, or to take such other steps as in his sole discretion, or in the discretion of the Executive Council, may be necessary to enforce the payment of said annual sum of three hundred dollars.

XVII. The franchises, concessions, rights and privileges hereby granted, or any one or more of them, may be assigned and transferred in whole or in part by the said Guanica Land Company, and by its successors and assigns, and it and they may grant license in respect thereto, every such assignee and licensee, unless otherwise provided by the instrument of assignment or grant, shall succeed to and acquire all the rights, liberties, privileges, power and authority herein granted or conferred upon the said Company, and shall also be bound by and obligated to the observation and performance of all terms, conditions, agreements and stipulations herein contained, so far as the same are applicable to such assignment or grant.

[fol. 15] XVIII. In accordance with Section 3 of Public Resolution No. 23, approved May 1st, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal; and that issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation equal in amount to the par value of the stock or bonds issued, and the declaration of stock or bond dividends, are forbidden.

XIX. The franchise, privileges, rights, concessions and authority herein granted, are granted for the term of ninety-nine years, beginning from the date of the acceptance hereof as hereinbefore provided.

XX. The franchise, privileges, concessions and authority hereby granted, are granted in accordance with and subject to the provisions of the existing laws now in force in Porto Rico and all terms hereof shall be construed in accordance therewith.

XXI. Nothing herein in this grant contained shall be construed to give the said Company, or its successors, or to the asisgns in whole or in part of any of the rights and privileges herein granted, the right, directly or indirectly, with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.

XXII. The Executive Council hereby reserves the right at any time after the date of this grant to declare the said Company, its successors and assigns, a common carrier with respect to said railroad and wharf, and to extend the use of said railroad and wharf, to the general public upon such terms and conditions as to rates and tariffs as the Executive Council may from time to time establish.

[fol. 16] Done in open session of the Executive Council on this the nineteenth day of March, 1901.

William H. Hunt, President of the Executive Council. Approved: Chas. H. Allen, Governor of Porto Rico.

EXHIBIT "B" TO PETITION

In the Public Service Commission of Puerto Rico

Case Number J2763

In re Cancellation of Franchise Number 5, Entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of Its Lands, and Also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a private Railway Along Certain Portions of the Harbor of Guanica

Order to Show Cause

The Public Service Commission to Russell & Company, Sucrs., S. en C., Ensenada Estates, Inc., and its assignees, Guanica Central, and its assignees, and to any other person or legal entity which may have acquired any rights, by grant or purchase, of the above entitled franchise:

Please take notice that you, Russell & Company, S. en C., a limited partnership constituted in accordance with the laws of Puerto Rico, with its principal office at Number 11 Leon Street, in the city of Ponce, Puerto Rico; Ensenada Estates, Inc., a corporation constituted under the laws of the State of Connecticut, or its assignees; Guanica Central, a corporation organized under the laws of the State of New Jersey, or its assignees; and any other person having any interest, by grant or purchase, in the aforegoing franchise, are hereby ordered to appear before the Public Service Commission of Puerto Rico, in the session room thereof, [fol. 17] at Number 1 Allen Street, San Juan, Puerto Rico, on the 4th day of June, 1928, at 2:30 P. M., to show cause, if any you may have, and to state the reasons why this Public Service Commission should not totally cancel the franchise entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica," granted by the Executive Council of Puerto Rico on March 19, 1901.

The grounds for the nullity affecting the validity of said franchise are as follows:

I. That the present holder of this franchise, which acquired the same by assignment made thereto by the Ensenada Estates, Inc., is at present enjoying the benefits, rights and grants to which the franchise herein involved refers, the assignment or grant by virtue of which it apparently acquired said rights never having been approved by the Public Service Commission of Puerto Rico.

That the franchise was originally granted on March 19, 1901, by the Executive Council of Puerto Rico to the Guanica Land Company and the latter assigned it to the Guanica Central, the said assignment having been approved by the Executive Council of Puerto Rico on the 31st of October, 1901.

That said corporation Guanica Central was extinguished on June 30, 1917, and that it does not appear from the files of this Commission, nor from those of the Executive Council of Puerto Rico, that before the date mentioned, nor subsequent thereto, any grant of assignment of the franchise in question was ever approved or authorized.

That under date of July 18, 1917, the Ensenada Estates, Inc., appeared and prayed from this Public Service Commission that the assignment of the franchise in question in favor of the limited partnership Russell & Company be approved, and that the approval of this assignment was denied by this Commission on January 13, 1918.

[fol. 18] II. That neither the Guanica Land Company, original holder of this franchise, nor the Guanica Central, nor Ensenada Estates, Inc., nor Russell & Company, Sucrs., S. en C., nor any other person, have complied with the provisions of section 14 of the franchise in question, inasmuch as no detailed plans have been submitted to the approval of the Commissioner of the Interior of Puerto Rico of the works to be done in accordance with said franchise, or of the alterations or changes to be made thereon subsequently.

III. That the holder of the franchise has allowed on different occasions, as for example in the year 1914 and in the year 1922, and specifically from and after the month of July, 1926, to the present, that the level of the waters of Guanica Lake be kept at a height greatly in excess of the customary level of the waters of said lake during the rainy

season in extraordinary years; all of this in violation of the provisions of section 4 of the franchise in question.

That this excess of water in the Guanica Lake over and above the normal level during the rainy season has flooded, with an average of two or three feet of water, a zone of land whose area varies between five and six thousand cuerdas in the Municipality of Lajas, causing grave injury and damages, individually, to the owners of the land so flooded, as well as to the community in general.

That the flood just mentioned above has extended over the neighboring roads of the Municipality of Lajas known as "Fabiani" and "Don Mariano", for an approximate length of seven to eight kilometers, having besides cut off partially the station of the American Railroad Company of Puerto Rico in the ward of La Plata.

IV. That the grants, privileges and rights enjoyed by virtue of this franchise are:

(a) The use of water for purposes of irrigation in private lands;

(b) The construction of a private wharf in the harbor of Guanica; and

[fol. 19] (c) The construction and operation of a private railway in Guanica.

That said grants, privileges and rights are of a purely private and personal character and that from the wording of the said franchise it does not appear that at any time a service of a public nature is ever rendered; and even if no express or implied violation of the terms of this franchise has been committed by the present or former holders thereof, the consequences ensuing from the enjoyment of the rights granted by the franchise have occasioned grave and considerable injury to a great number of persons in their private properties, as well as to the public in general, without any compensation therefor.

And that there is no legal nor moral reason justifying the continuation of the enjoyment of the rights and privileges comprised under the franchise herein discussed, with the sole object of giving a private service, to the grave injury of the public interest of a community.

All of the preceding reasons constitute, in the opinion of this Public Service Commission, sufficient ground to justify the final cancellation of the franchise mentioned in the body of this order; and this Commission will do so without further summons or hearing, if you fail to appear at the place, date and hour stipulated in this order.

It was so ordered by the Public Service Commission of Puerto Rico.

San Juan, Puerto Rico, May 26, 1928.

By Miguel A. Munoz, President.

EXHIBIT "C" TO PETITION

Municipal Government of Lajas, Puerto Rico

Office of the Secretary

Resolution

Complaining Before the Public Service Commission and Before the Commissioner of the Interior of Puerto Rico of the Damages and Difficulties Caused by the Flow-Back and by the Overflow of the Waters of the Dam of Guanica Lake.

[fol. 20] Whereas the government of Lajas has received a complaint signed by a number of real estate owners and residents of the ward of Costa of this municipality, wherein they complain of the difficulties created by the flow-back and overflow of the waters of Guanica Lake, which from and after the year 1926 have cut off and interrupted the communication between two of the principal roads of this jurisdiction, these waters extending at present over the most fertile portion of said ward, thus preventing the cultivation and exploitation of the lands and threatening the public health with the diseases which by reason of this anomalous situation have arisen and have made life inconvenient by reason of the mosquito plagues which have developed in said region;

Whereas the said Guanica Lake has always had as outlet the Negro Pond, which connects it with the sea, and according to information received by this Municipal Assembly, this situation is due to the fact that at the mouth of Negro

Pond of the Guanica Lake tree-trunks and walls of ground have been raised, which prevent the flow of water from the lake and have forced and raised the level of the waters to points and heights which they never reached before, and the same had never affected the conditions of this community like they are affecting it at present, nor caused any disease and loss of property, nor any complaints like the one now brought before this municipal body had been filed before;

Whereas this Municipal Assembly has been informed that the works which prevent the outlet of the Guanica Lake and caused the flow-back of the waters have been carried out under the authority of the Executive Council of Puerto Rico or under a franchise of the Public Service Commission, and it is known by this Assembly that the flood or invasion of these waters has cut off the station of the American Railroad Company in the ward of La Plata from the ward of Costa, through roads numbers 9 and 10 of this municipality, which are known as Fabiani and don Mariano roads, and it is of general knowledge in this municipality that at present, and from and after the year 1926, these roads can not be used, and it is necessary to evade them [fol. 21] by going around the town of Lajas in order to reach the said railroad station, and all of this cause material injury to this municipality; and

Whereas it is the unavoidable duty of this municipal organism to protect the health and welfare of its citizens and taxpayers; and in order to procure the health of its people it should always act in such a manner that the community be always safeguarded and defended according to law;

Therefore, be it resolved by the Municipal Assembly of Lajas, Puerto Rico:

I. To complain before the Public Service Commission of Puerto Rico and before the Commissioner of the Interior of Puerto Rico that the engineering works carried out on Negro Pond of Guanica Lake are causing irreparable damages to the Municipality of Lajas, by throwing the waters of Guanica Lake beyond their highest level; by invading, as they have, municipal roads numbers 9 and 10 of this jurisdiction, and by making the life of the residents and real estate owners of the wards of Costa and Plata impossible, and in order that an investigation of the case be made by the proper party so as to protect the interest of one of the

richest regions of Puerto Rico and the health and life of this community.

II. To send a certified copy of this resolution to the Hon. Public Service Commission of Puerto Rico, another copy to the Hon. Governor of Puerto Rico and a third one to the Commissioner of the Interior for their information and control.

III. This resolution being of an urgent nature will become effective immediately after its approval by the Hon. Mayor, and repeals and annuls any other resolution, ordinance or proclamation contrary thereto.

I hereby certify that the foregoing resolution was adopted by the Municipal Assembly of Lajas, Puerto Rico, in a special session held on the 24th of February, 1928, and that the same was approved by the Mayor on the 27th of the said month and year.

Juan J. Flores, Municipal Secretary.

[fol. 22] I, L. F. de Vizcarrondo, Secretary of the Public Service Commission of Puerto Rico, do hereby certify:

That the foregoing resolution is a true and faithful copy of a certified copy thereof appearing of record in case No. J2763, entitled "Resolution complaining before the Public Service Commission and before the Commissioner of the Interior of Puerto Rico of the damages and difficulties caused by the flow-back and by the overflow of the waters of the dam of Guanica Lake," approved by the Municipal Assembly of Lajas the 24th of February, 1928, and by the Mayor on the 27th of said month and year.

In witness whereof, and at the request of O. B. Frazer, Esq., I issue these presents under my hand and the official seal of the Commission, in San Juan, Puerto Rico, this 6th day of April, 1929.

L. F. de Vizcarrondo, Secretary.

[The official seal of the Commission is affixed herein.]

EXHIBIT "D" TO PETITION

Government House, Porto Rico

San Juan, Puerto Rico, May 22nd, 1928.

Honorable Miguel Munoz, President Public Service Commission, San Juan, Porto Rico.

SIR:

I am sending you herewith a letter from Mr. Esteves, Commissioner of the Interior, with the accompanying file, regarding flood conditions in the southwestern part of Porto Rico, occasioned, it is claimed, by the violations of a public franchise granted to the Guanica Land Company in 1901. It is recommended that you take action to hold a Public Hearing as to the advisibility of repealing said franchise and to take such other action as may be necessary in the interest of the People of Porto Rico. As the conditions are considered serious and delay may bring further and grave injury, it is urged that this hearing be called at the earliest possible date.

[fol. 23] I approve the suggestion, and hope that such hearing may be ordered at no distant date.

Respectfully yours, H. M. Towner, Governor.

Certificate

I, L. F. de Vizcarrondo, Secretary of the Public Service Commission of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful copy of the original letter, appearing of record in case No. J-2763, dated May 22, 1928, addressed by the Honorable Governor of Puerto Rico to the President of the Public Service Commission in connection with the flood of the valley of Lajas, wherein the former official suggests the calling of a public hearing at the earliest possible date.

In testimony whereof and at the request of O. B. Frazer, Esq., I issue these presents under my hand and the official seal of the Commission, in San Juan, Puerto Rico, this sixth day of April, 1929.

L. F. de Vizcarrondo, Secretary.

[The official seal of the Commission is affixed.]

Government of Porto Rico,

Department of the Interior

May 22, 1928.

The Honorable The Governor of P. R., San Juan:

SIR:

I have the honor to inform you that the Department of the Interior, upon petition from the Municipal Council of Lajas, investigated the causes of the actual flood of Lajas Valley, and according to preliminary report about the matter, presented to me by the Assistant Superintendent of Public Works, this special situation has been apparently created by the violation by the Guanica Land Company of some of the provisions of the franchise granted to them on the 19th of March, 1901, a copy of which accompanies this report. Allow me to call your attention especially to sections 1, 2, 3, 4, 7 and 14.

[fol. 24] I wish to state that according to the records of our files, the Guanica Land Company never submitted plans of the works to be done across "Cano Negro."

There is no record that the customary level of Guanica Lake during rainy seasons at the time the franchise was granted, was ever determined.

From the investigation we have been able to ascertain that several municipal roads of the municipalities of Lajas and Guanica, since 1926 are flooded, and that considerable amount of private lands are at present well under water, and to our knowledge none of the damages sustained by abutting owners have been borne by said Guanica Company.

I beg to submit to your consideration a clipping from daily paper "El Mundo," edition of Saturday, May 19th; according to reports from the Superintendent of Public Works, conditions are as serious as described in said clipping.

From the report under my consideration, I am inclined to believe there is sufficient cause to urgently request the Public Service Commission to call a Public Hearing to determine the conveniency of repealing said franchise, provisions of which have been violated, causing constantly considerable damage to both public and private property.

I could present the matter directly to the Public Service Commission if you so desire.

Respectfully yours, Guillermo Esteves, Commissioner.

Certificate

I, L. F. de Vizcarrondo, Secretary of the Public Service Commission of Puerto Rico, do hereby certify:

That the foregoing is a true and faithful copy of the letter which under date of May 22, 1928, the Hon. Commissioner of the Interior addressed to the Honorable Governor of Puerto Rico in connection with an investigation practiced by the Assistant Superintendent of Public Works of the said Department, with regard to the causes that have given [fol. 25] rise to the flood of Lajas Valley, the original of which letter appear- of record in case No. J-2763 of this Commission.

In testimony whereof and at the request of O. B. Frazer, Esq., I issue these presents under my hand and the official seal of the Commission, this 6th day of April, 1929, in San Juan, Puerto Rico.

L. F. de Vizcarrondo, Secretary.

[The Official Seal of the Commission is affixed.]

Exhibit "E" to Petition

In the Public Service Commission of Puerto Rico

Case No. J2763

In re Cancellation of Franchise Number 5, Entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of Its Lands, and Also for the Construction of a Wharf in the Harbor of Guanica, and Also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica"

Special Appearance and Motion to Dismiss the Case

Now come the South Porto Rico Sugar Company, a domestic corporation of Puerto Rico, and Russell & Company,

Sucrs., S. en C., a civil agricultural partnership composed of Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edwin L. Arnold and H. B. Orde, as partners, and appearing especially with the sole object of impeaching the jurisdiction of this Hon. Public Service Commission, allege:

1. That the Public Service Commission lacks jurisdiction over this case and that it does not have jurisdiction to cancel the franchise mentioned in the order to show cause issued by the Commission on May 26, 1928.

2. That none of the parties appearing in this cause is a public service corporation or a public service partnership, or is engaged in any manner in public service, and that this Commission does not have jurisdiction over these parties or over any one of them.

[fol. 26] Wherefore petitioners pray that this case be dismissed and filed away and that the order to show cause be equally dismissed.

O. B. Frazer, Attorney for the South Porto Rico Sugar Company, and for Russell & Company S. en C.

EXHIBIT "F" TO PETITION

In the Public Service Commission of Puerto Rico

Case No. J-2763

In re Cancellation of Franchise No. 5, Entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for the Purposes of Irrigation of Its Lands, and Also for the Construction of a Wharf in the Harbor of Guanica, and Also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica"

Answer of Russell & Company, Sucrs., S. en C., to the Order to Show Cause

Now comes Russell & Company, Sucrs., S. en C., a civil agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde, as partners, and as their answer to the

order to show cause issued by this Hon. Commission on May 26, 1928, alleges as follows:

1. That on or about the 15th day of March, 1917, the corporation Guanica Centrale, which at the time was the owner of the franchise to which the order to show cause herein refers, assigned and granted for value received to the Corporation Ensenada Estates, Inc., a corporation of the State of Connecticut, all of that part of said franchise and of the rights therein contained, referring to the use of certain waters of Guanica Lake for purposes of irrigation, that is, to be more specific, the rights contained under Paragraphs I and IV, inclusive, of said franchise; and that subsequently, v. g., on or about the 29th day of June, 1917, the said corporation Ensenada Estates assigned and granted for value [fol. 27] received to the partnership appearing herein, the above mentioned part of said franchise, and that this partnership is at present the owner of all that part of said franchise having to do with the use of water for purposes of irrigation; that the said assignments or grants were communicated to the Executive Council of Puerto Rico and to the Public Service Commission, and although it is true that they were not approved by said Council and Commission, such approval was unnecessary for their validity inasmuch as the franchise itself authorizes its assignment or grant.

II. Answering Paragraph "II" of the order to show cause, this partnership alleges that neither this partnership nor the former owners of that part of the franchise which refers to the use of certain waters has not carried out any works in connection with the taking of water for the use to which said paragraph refers, and that inasmuch as it has not done the said works, it was not necessary or possible to submit plans to the Commissioner of the Interior.

III. Answering Paragraph "III" of the order to show cause this partnership admits that on the dates mentioned the level of the waters of the Guanica Lake has been higher than the usual level and that some lands and roads have been flooded, but it does not know the extent of such flood; but this partnership alleges that the said flood and high level of the waters of Guanica Lake were not caused by any act, blame or negligence of this partnership or of the former owners of the franchise, but solely by acts of nature beyond the control of this partnership. It goes on alleging that if

any person has suffered damages for the reasons stated in the order to show cause, the only remedy of such person is the remedy by suit granted by the franchise itself, and that said reasons do not justify at any time the cancellation of the franchise.

IV. Answering Paragraph "IV" of the order to show cause, this partnership alleges that the Executive Council had sufficient power and authority to grant the said franchise, and that the same is entirely valid and legal; that [fol. 28] this partnership and the former owners of the franchise have always complied with the provisions thereof; that acting in good faith and in acordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake, and that the cancellation of said franchise would cause to this partnership a great loss of money and property; that the said cancellation would be equivalent to the taking of the property of this partnership without due process of law and besides a taking of the private property of this partnership for public purposes without just compensation and will be contrary to the fifth and fourteenth amendments of the Constitution of the United States and to the Organic Act of Puerto Rico, approved by Congress March 2, 1917, and to the acts and statutes of Puerto Rico and of the United States.

As a second and distinct defense and as an answer to the order to show cause, this partnership alleges:

V. That this Hon. Public Service Commission does not have jurisdiction over this partnership.

As a third and distinct defense and as an answer to the order to show cause, this partnership alleges:

VI. That although this partnership had no obligation whatsoever to do so, it has taken the necessary and proper steps to lower the height of the waters of Guanica Lake to its customary level and to guarantee that in the future the waters will not go beyond the customary level, and that this partnership has paid all the expenses of said works out of its own money.

Wherefore the petitioner prays that the order to show cause be dismissed and that this case be filed away.

San Juan, Puerto Rico, November 27, 1928.

O. B. Frazer, Attorney for Russell & Company, Sucrs., S. en C.

THE PEOPLE OF PUERTO RICO,
District of San Juan, ss.:

O. B. Frazer, being duly sworn, deposes and says that he [fol. 29] is the attorney for Russell & Company Sucrs. S. en C., that he has read the foregoing answer; that to his best knowledge the same is true and that the reason why this verification is made by the deponent and not by said partnership is that none of the members thereof is within the Island of Puerto Rico.

O. B. Frazer.

Sworn to and subscribed before me, this 27th day of November, 1928, by O. B. Frazer, of full age, married, attorney-at-law and a resident of San Juan, Puerto Rico, to me personally known.

Luis Tirado Geigel, Notary Public.

Affidavit No. 441.

EXHIBIT "G" TO PETITION

In the Public Service Commission of Puerto Rico

Case No. J-2763

In re RUSSELL & COMPANY, Sucrs., S. en C., et al.

Order

For the reasons stated in the report of the President of this Commission, dated March 7th, 1929, and for the conclusions reached therein—the said report being hereby approved and made a part of this order—the Commission, after carefully studying the record of this case and fully considering the matter,

Orders the cancellation—as it hereby cancels—of that part of the franchise number 5 which refers to the use of

certain waters of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19, 1901, entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica";

Provided that this cancellation shall become effective June 30, 1929. It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any [fol. 30] further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept.

This order was rendered with the unanimous vote of the commissioners.

Let the parties be notified.

San Juan, Puerto Rico, March 8, 1929.

Miguel A. Munoz, President of the Commission.
Attest: L. F. de Vizcarrondo, Secretary.

In the Public Service Commission of Puerto Rico

Case No. J-2763

In re Cancellation of Franchise No. 5, entitled "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters or the Purposes of Irrigation of Its Lands, and also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica."

Report

On February 24, 1928, a special session was held by the Municipal Assembly of Lajas in order to complain of the overflow of the waters of Guanica Lake, it being alleged that said waters had made unfit for traffic certain parts of municipal roads; and as it besides caused the existence of mosquito plagues which made life impossible in said region

by reason of the annoyance and diseases which they caused, this resolution was forwarded to the Public Service Commission.

The case was submitted by the Commission through a letter dated March 10, 1928, to the Attorney General, in order that this officer might take whatever steps he might deem proper. This letter was returned by the Acting Attorney General on the 13th of March, alleging as a reason there-[fol. 31] for that our endorsement did not request any action on the part of the Department of Justice.

On May 22, 1928, Governor Towner transmitted to the undersigned president a communication of the Department of the Interior describing the situation in Lajas Valley and recommending an investigation of the matter and the adoption of the necessary measures to defend and safeguard the interests of the public and of the People of Puerto Rico; urgent action was requested.

By virtue of this request of the Hon. Governor, the undersigned president appeared in the city hall of Lajas with the object of making a preliminary investigation with regard to the situation of the Lajas Valley, and after listening to a number of witnesses, appeared with his report before the Public Service Commission and this latter body, under date of May 26, 1928, issued an order to show cause directed against the holders of franchise number 5 or against any one who might be enjoying the rights granted by said franchise, and ordering them to appear and explain the reasons and grounds whereby the said franchise should not be canceled. This order averred:

1. That from the official records of this Commission it appears that several of the assignments which had been made of this franchise were never approved by the Commission.

2. That neither the original holder of this franchise nor any other person has complied with the duties imposed by same as regards the forwarding of plans or sketches of the works to be done, or of the alterations or changes to be made thereon.

3. That the holders or beneficiaries of this franchise, in the year 1914 and in 1922, and especially from and after the month of July, 1926, and up to the present, have allowed the level of the waters of Guanica Lake to be kept much

higher than the customary level of the waters of said lake during the rainy season in years of average and usual rainfall and that this causes grave injury in view of the fact that an area of five or six thousand acres of land has been flooded with an average depth of two or three feet of water.

4. That this franchise contains several grants, to wit: [fol. 32] One for the use of water for purposes of irrigation of private lands; another for the construction of a private wharf in the harbor of Guanica; and a third one for the construction and operation of a private railway in Guanica. That all these grants, as said before, have a private character, and that with the use of same, in case there has been an express or implied violation of the terms of the franchise, the consequences and results brought about by the exercise of the rights granted, have caused considerable damages and grave injury to the private property of a great number of persons, as well as to the public in general.

This was the order that was notified to the respondent on May 26, 1928. The hearing of this order was set for June 4th, 1928, and prior to the hearing thereof the respondents appeared before the United States District Court for the District of Puerto Rico requesting the issuance of a writ of injunction to refrain the Commission from holding a hearing, alleging, among other things, that this Commission lacked authority to amend or cancel the franchise which the Executive Council had granted. The restraining order was issued and once the final hearing of the case was held, the Federal Court dismissed the petition filed by the respondents. Feeling aggrieved by this order they appealed to the United States Circuit Court of Appeals for the First Circuit and in the meantime the Public Service Commission, as it understood that this was an urgent case, set the hearing of the case anew; but before the hearing could be held, the respondents obtained a new restraining order against this Commission, issued as a supersedeas by the Circuit Court of Appeals. On the 10th of November, 1928, we were advised that the said Court of Appeals had dismissed the appeal of Guanica Central and we set once more the hearing which had been pending since May, for November 27, 1928.

Finally, on that day the parties appeared and after raising some questions of law which were decided as the record shows, we went on to hear the testimony of the witnesses. The case could not be finished at a single session and had [fol. 33] to be postponed at the request of the Attorney General, who alleged that he needed some additional documents, and under the circumstances, additional settings were made till all the evidence was finally adduced during the 18th, 19th and 20th of February, 1929.

The undersigned president is in a position to assure that besides the information that he obtained through the testimony of the numerous witnesses who testified before this Commission, he was also in a position to personally notice Guanica Lake on different occasions, as well as the flooded region. It is estimated that this zone under water, according to the testimony of witnesses and to the observation we made, covered an area which varied between four and five thousand acres of land, and as appears from the photographs presented herein, we were able to confirm that numerous trees, as well as roads for eight or ten kilometers, farms in their entirety, where we could notice only the top of the posts of the barbed wire fences, were covered with water for a depth of two to three feet. This was around the month of May when I went there to hold the hearing. Again I visited the flooded region early in the month of January of this year and still there was under water a great portion of land which was estimated by Messrs. Maxwell and Page, of the respondents, as well as by one of the complainants, to have an approximate area of two thousand acres. It is true that in the meantime we had the cyclone of San Felipe of September 13, 1928, and that there was an extraordinary rainy season.

From the evidence adduced before this Commission it appears that since the month of July, 1926, a great flood began suddenly which covered all of the area known as "El Anegado" (overflowed region), on the area that we have already indicated, the water having been kept approximately with that same level since that date, that is, since the middle of the year 1926, during all of the year 1927 till late in the year 1928. The difference in the area of the flooded region has not been noticeable till early in the year 1929. There are within this flooded region around twenty-five or thirty different owners of rural properties who have their

lands flooded, some in their entirety and others partially, [fol. 34] and who are deprived, of course, of the right they have of using their lands as they may deem most convenient.

It appears furthermore that there are municipal roads that for seven or eight kilometers have been absolutely cut off to traffic during all this length of time, except by boat.

The question arises immediately: What is the cause of this situation? The complainants allege that the same is due to the fact that the outlet of the old Guanica Lake is obstructed and that when it receives the rain waters that run to said body, as well as the waters of the Loco River, the level of the lake goes up, gets flooded and the waters go back towards Lajas, thus covering the valley to the extent which we have indicated. On the contrary, the respondents allege that these floods are due to the existence of extraordinary rains and that the basins of the Lajas valley, tributaries of this lake, have been filled with a greater volume of water than is customary, and that this has brought about this situation.

In my opinion we should not lay great stress to the attempt made to show that Loco River was made to change its old bed and made to flow in the lagoon. The conflict in the evidence on this point is such that it seems to me that we may say that even before the Guanica Central had this franchise, Loco River ran over the same place that it runs at present, that is, that it flowed in the lake, at least partially, but there is no doubt, and it was so admitted by the respondents, that they have done said works within the bed of the river in order to prevent its waters from overflowing and also that this, with all the other improvements made by them in the bed of the river and with the works that appear to have been carried out, will undoubtedly contribute to the flowing of a greater volume of water into the lake than that which flower formerly.

In any event, this case does not depend on this question nor should the same be taken into consideration at the time of its decision. Here the basic, primary and important question is that the Executive Council granted a franchise to the Guanica Land Company by virtue whereof this com- [fol. 35] pany was authorized to take a certain quantity of water, not to exceed twenty million gallons per day, for purposes of irrigation, and that by virtue of clause four of

the said franchise the following obligations were imposed on the grantees:

"That nothing herein contained shall be held or construed to authorize or permit the said company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof, during the rainy season, as the same exists in years of average and usual rainfall."

It is true that from the records of this Commission, as well as from the records of the Department of the Interior it appears that at no time the Government, or its representatives, fixed the level at which the waters of this lake should have been kept; and it is true also that the company did neither submit any data or report with regard to the level at which it was bound to keep these waters. From Mr. Page's testimony—who testified that he was field superintendent of Russell & Company, S. en C., the assignee of this franchise—it plainly appears that these companies were never interested in knowing the level at which they should keep these waters, with the object of not causing any damages to third parties. Mr. Page himself testified under oath that for the last ten or twelve years he had been in charge of the field work of all the lands; that he was the person responsible of the supervision of said works and that he did not know, nor had ever known, the level which they should not allow the waters of the lake to exceed, and that nothing to this respect was ever communicated to him by the company. If together with the testimony of Mr. Page, a high official of the respondent, we take the testimony given us by the engineer of the Department of the Interior, Mr. H. Blanco, it will not be hard for us to reach a conclusion.

It should be remembered that Mr. Blanco testified that he had made a thorough investigation of the whole situation created by this flood and that he was there personally for about two months collecting data and making daily observa- [fol. 36] tions, and that from his own observation he was able to say that the former outlet of Guanica Lake was "Los Negros" pond and that this outlet was absolutely interrupted for about three hundred meters, close to the lake, and that after this distance the bed of the old pond could be seen; but that for about three hundred meters, close to the

lagoon, as has been already said, the land was absolutely flat and no one could notice in that place that there had ever been a pond there. These lands were under the control of the respondents and it was in their own interests to keep the level of the lake as high as possible in order to have a sufficient amount of water so as to plant as large an area of sugar cane as possible. And if we add to this the fact that it was shown before this Commission, with credible and convincing evidence, like the testimony of Mr. Feliu and others, that they had received offers whereby in exchange of their flooded lands the respondents offered other lands, it will not be a hard task to state who is responsible of this situation. But in order to reach this conclusion we are not to be guided solely by the testimony of such witnesses, as it could be said in an extreme case that they are interested parties, as their lands are flooded. But we have besides letters appearing in our own files, subscribed by the manager of this company, making these offers in writing and giving as the reasons for this that they are good neighbors and that as the lands of their neighbors were flooded they did not want the latter to suffer any damages.

That is the situation that has been stated and it is my belief that by virtue of the terms of the franchise, the company was bound to know and to keep a fixed level above which it should not have allowed the waters of the lake to raise, unless this was caused by extraordinary circumstances. We shall presume, of course, that if the pond that served as an outlet to the lake is situated on lands controlled by the respondents, and that this pond has been completely dried out or eliminated, the respondents are responsible of the consequences, unless they prove to us the contrary in a conclusive manner. But we shall presume [fol. 37] that this situation could not have been created without their consent or knowledge.

Other questions were, of course, raised in the order that we issued as for example the approval of the assignments, the situation created by the mosquitoes in this zone, as well as other questions; but I understand that there is no need of discussing them when from the foregoing the conclusion may be reached definitely that the franchise should not continue to exist inasmuch as it has brought about difficulties to this Commission and to the Insular Government; difficulties to the Municipal Government of Lajas,

as well as annoyance, bother and damages to several private persons.

I suggest that this franchise be canceled solely with regard to that part authorizing the company to take water from the Guanica Lake and that in so far as the operation of a railway and the construction of a wharf are concerned, the same be left effective in its entirety, so as to issue separate new franchises identical in form to the one now in force, in favor of the present grantees of the old franchises. If the persons who enjoy at present the right granted by this franchise are interested in using these waters of the lake for purposes of irrigation there will be no objection to their filing a new petition submitting the highest level at which they agree to keep the waters, as well as the plan of the works that they intend to carry out in order that said level be permanently kept and then, after this has been done, the Commission will decide what it may deem convenient.

Respectfully submitted, Miguel A. Munoz, President of the Commission.

San Juan, Puerto Rico, March 7th, 1929.

Attest: L. F. de Vizcarrondo.

[fol. 38] EXHIBIT H TO PETITION

THE PEOPLE OF PUERTO RICO,
District of San Juan, ss:

O. B. Frazer, being duly sworn, deposes and says:

That he is the attorney for Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and H. B. Orde, appellants in the petition for appeal taken from the order rendered and entered by the Public Service Commission of Puerto Rico March 9th, 1929, which petition is accompanied by this affidavit; that this appeal is not taken with the object of delaying the cause, but solely because the appellants and the undersigned attorney verily believe that grave injustice and error have been committed in the order appealed from; that the reason why this sworn statement is subscribed by the deponent and not by the plaintiffs is that none of these appellants resides within the

Island of Puerto Rico and that they have authorized the deponent to present this appeal and affidavit.

O. B. Frazer.

Affidavit Number 172.

Sworn to and subscribed before me this 8th day of April, 1929, by O. B. Frazer, of full age, married, attorney-at-law, resident of San Juan, Puerto Rico, to me personally known.

R. Castro Fernandez, Notary Public.

[A twenty-five cent excise stamp is duly canceled.]

[fol. 39] In District Court for the Judicial District of San Juan, Puerto Rico

Civil No. 9192

Horace Havemeyer, Frank A. Dillingham, et als., Appellants,

v.

Public Service Commission of Puerto Rico, Defendant

Appeal from an Order of the Public Service Commission of Puerto Rico

Answer—Filed July 3, 1929

Now comes the Public Service Commission of Puerto Rico by the undersigned Attorney General and Assistant Attorney General, and in conformity with the provisions of Section 82 of Act No. 70, approved December 6, 1917, answers the petition for appeal filed herein by the appellants, and to that end states and alleges:

1. The Commission denies, for lack of sufficient information, that the plaintiffs are the sole partners of Russell & Company, Sucesores, S. en C. For the same reason it denies that the appellants are owners of part of franchise number 5, granted by the Executive Council of Puerto Rico to the Guanica Land Company, which refers to the use of certain waters from Guanica Lake for purposes of irrigation; and in connection with the said alleged cession the Commission alleges that the same has not been approved

by the Executive Council of Puerto Rico or by the Public Service Commission of Puerto Rico. It also denies, for lack of sufficient information, the averments of the second part of the first paragraph of the petition relative to the residence of each of the appellants, or the respective capacity of each of the members of the firm Russell & Company.

2. The Commission admits the averments of paragraph II of the petition.

3. The facts alleged in paragraph III of the petition are admitted.

4. The facts alleged under paragraph IV of the petition [fol. 40] are admitted, but defendant alleges that the acts of the Commission or of its officers, described therein, are entirely in accord with the law.

5. The Commission admits that the appellants, on November 27, 1928, filed an answer to the order to show cause, mentioned in the fifth paragraph of the petition. The defendant alleges that when said answer was filed, the appellants voluntarily submitted to the jurisdiction of the Commission and the latter was legally authorized thereby to decide the controversy as the same was brought before the Commission by the parties in interest.

6. The averments contained under paragraph sixth of the petition are admitted.

The defendant denies in general having committed the errors separately specified under paragraph seventh of the petition; and referring especially to each of the errors assigned under the twenty-four subdivisions which said paragraph contains, the Commission alleges:

That subdivisions 1, 2, 3, 4, 5 and 6 of said paragraph seventh contain alleged errors on questions of law which have been already judicially determined, against the appellants, in a case decided by the Circuit Court of Appeals for the First Circuit, entitled South Porto Rico Sugar Company et al. v. Munoz et al., 28 Fed. (2d) 820.

That the questions of law raised under said subdivisions of paragraph seventh of the petition affect the jurisdiction of the defendant and have been determined and decided by a final judgment rendered by a court of last resort in said suit, over the same subjects, for the same

reasons, in connection with the same parties herein and under the same capacity that they appear in this case.

Referring especially to the averments contained under subdivision four of said paragraph seven, the defendant alleges that it committed no error, and that in so far as the appellants are concerned the Commission acted with full legal authority.

Referring especially to the averments contained under subdivisions 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, [fol. 41] 21, 22, 23 and 24, the Commission especially alleges: That in its own acts it has complied with law, has used the most sound discretion and has taken into consideration the averments and the evidence offered by the parties in interest and legally admitted by the defendant during the course of the meetings held with the object of giving due consideration to the case at bar and considering always the public interests in general and particularly the interest of the inhabitants who reside or have their properties in the valley of Lajas.

That in accordance with the law, the resolution or order appealed from can not be reviewed by this court in so far as the manner of weighing the evidence offered and legally admitted during the hearing of the case is concerned; the defendant weighed this evidence in the exercise of its discretional power in order to enter the findings of facts which served as basis to the order appealed from.

The defendant especially alleges, in connection with the alleged error assigned under subdivision 23 of said paragraph seven, that it has full discretionary authority to acquiesce to an ocular inspection, or to deny it, in any case under its consideration, and that it acted correctly in refusing an ocular inspection in the present case, inasmuch as it was of the opinion that the same was unnecessary.

7. The Commission alleges that the whole of paragraph nine of the petition is immaterial and irrelevant. That said paragraph does not state specific errors, but only mere conclusions of law, vaguely expressed and hence the same should not be considered by this court and should be stricken from the petition.

The Commission denies that it has violated any constitutional or statutory provision in the case to which the present appeal refers. On the contrary, it sets forth and alleges that all its acts and resolutions therein were agree-

able to the law in force, in accordance with the most sound judicial discretion and that their sole object was the protection of the public interest in general and particularly the interest of the persons residing in the valley of Lajas, which had been flooded to the great prejudice of life and [fol. 42] property by reason of the activities contrary to law on the part of the appellants or their predecessors, who wrongfully used the rights granted them by virtue of franchise number 5 of the Executive Council of Puerto Rico, partially canceled by this Commision. And it alleges besides that the order from which the present appeal has been taken is just and reasonable, is based on grounds of the most sound public covnenience and that the same has been entered by the defendant after fully hearing all the parties in interest and after giving, especially to the appellants, the fullest opportunity to defend themselves and of utilizing whatever proceedings they deemed convenient and necessary to their defense.

8. The defendant alleges that the petition for appeal in this case does not state sufficient reasons to be worthy of consideration by this court whose authority to review these cases is restricted and limited to the correction of certain class of errors not duly assigned in this petition, which for said reason ought to be dismissed.

By virtue whereof the defendant prays this court that the petition be dismissed and that the order appealed from be sustained in its entirety, by affirming it and sentencing the appellants to the payment of costs.

San Juan, Puerto Rico, July 2, 1929.

James R. Beverley, Attorney General of Puerto Rico; M. Rodriguez Serra, Assistant Attorney General.

[File endorsement omitted.]

Copy served this third day of July, 1929.

O. B. Frazer, Attorney for the Appellants.

[fol. 43] IN DISTRICT COURT OF SAN JUAN

ANSWER—Filed July 22, 1929

Now comes the Municipality of Lajas, as one of the defendants and appellees herein and by its undersigned at-

torney objects to the appeal filed by Horace Havemyer, Frank A. Dillingham et als., and states and sets forth as follows:

I. Owing to lack of sufficient information and belief to answer everything relative to the organization of the civil agricultural partnership Russell & Company and to the residence of the persons who claim to be members thereof, this defendant and appellee denies this averment. This defendant also denies, for lack of information and belief, everything alleged with reference to the acquisition by said persons of part of franchise number 5, granted to the Guanica Land Company for purposes of irrigation. The defendant and appellee also denies, for lack of information and belief, everything alleged under paragraph one of the petition for appeal in connection with the residence of the members of Russell & Company, and the defendant and appellee on the contrary alleges that the transfer or cession of the franchise which the petitioners herein claim, has never been approved by the Executive Council of Puerto Rico or by its successor, the Public Service Commission.

II. It admits paragraph two of the petition for appeal.

III. It also admits the statement of facts contained under paragraph three of the petition for appeal.

IV. It admits the facts averred under paragraph four of the petition for appeal and, on the contrary, alleges that in accordance with the authority granted by law to the Public Service Commision of Puerto Rico, no substantial error was committed by said Commission or by its officers, and that its proceedings were agreeable to the law in force, inas much as the Public Service Commision, in so far as the Commission itself was concerned, acted by voluntary submission of the appellants through its officers and duly authorized representatives.

V. It admits that the petitioners answered on November [fol. 44] 27, 1928, the order to show cause entered by the Public Service Commission on May 26, 1928; and it consequently avers that the petitioners submitted to the jurisdiction of the Public Service Commission when they filed their alleged answer (Exhibit F) inasmuch as with that averment the petitioners failed to insist that they were appearing especially and also on the motion to dismiss the

case that they had formerly filed, and on the contrary acknowledged and admitted the jurisdiction of the Public Service Commision to decide the case on the merits.

VI. The defendant admits the sixth paragraph of the petition for appeal.

VII. The defendant-appellee, the Municipality of Lajas, answers subdivisions 1, 2, 3, 4, 5 and 6 of paragraph seven of the petition for appeal by alleging that between the same parties, and for the same cause of action to which this petition for appeal refers, the questions of law raised in said assignments of error were definitively decided in South Porto Rico Sugar Company v. Munoz, 28 Fed. (2d) 820; and consequently the question is res judicata between the parties by reason of the above judgment of the Circuit Court of Appeals of Boston.

In connection with the assignments of error contained under subdivisions seven to twenty-three of the seventh paragraph of the petition for appeal, the defendant and appellee, Municipality of Lajas, alleges that the order of March 9, 1929, of the Public Service Commission of Puerto Rico is agreeable to the law of its creation, and its findings of fact can not be altered or reviewed by the District Court of San Juan in a petition for appeal like the present; and that the said order of March 9, 1929, is directly in accord with the highest considerations of public order and is in accord with the provisions of Act No. 70 of 1917.

And as regards subdivision number twenty-three of said paragraph seven of the petition for appeal, the Municipality of Lajas alleges that the Public Service Commission, acting as a court of justice, may discretionally acquiesce to a petition for an ocular view, or may deny the same without committing any fundamental error whatsoever.

[fol. 45] And the Municipality of Lajas finally alleges, in connection with the averments of subdivision twenty-four of paragraph seven of the petition for appeal, that an assignment which does not specify errors is vague and obscure, and, consequently, is not justified by law or precedents.

VIII. The defendant-appellee, Municipality of Lajas, admits that the documents mentioned under paragraph eight of the petition for appeal have been joined thereto.

IX. The Municipality of Lajas accepts the ninth paragraph of the petition for appeal by alleging: That said paragraph contains nothing specifying a substantial error or an error of procedure on the part of the Public Service Commission of Puerto Rico; and that as paragraph nine of the petition is a summary of the conclusions of law of the petitioners or appellants not justifiable under the adjective side of the law applicable to the case, the District Court should dismiss everything stated and alleged under said paragraph nine of the petition for appeal by ordering its elimination for the same is irrelevant and redundant.

The defendant Municipality of Lajas, on the contrary, alleges that the Public Service Commission has not violated any legal precept nor has deprived the plaintiffs-appellants of any of their constitutional rights; and it alleges, furthermore, that everything that the Public Service Commission has done or held in the case at bar is agreeable to the purposes for which the said Commission was created, namely, to protect and defend the public interests of the Island of Puerto Rico, and particularly the interests, life and health of the residents of the valley of Lajas affected by the behavior of the appellants herein or their legal representatives, employees or assistants. And the Municipality of Lajas especially alleges that the appellants in this case have had their day in court and have enjoyed all the constitutional guarantees granted for their defense before the Public Service Commission, and that the order of which they now complain is the direct consequence of the evidence offered and adduced before said Commission by the appellants herein.

Wherefore the Municipality of Lajas prays the Honor-[fol. 46] able District Court of San Juan that the petition for appeal filed by the petitioners be dismissed in due course and that the order of the Public Service Commission of March 8, 1929, be affirmed and sustained in its entirety, and that the appellants be sentenced to pay the costs of this suit.

Ponce for San Juan, July 20, 1929.

Rafael Perez Marchand, Attorney for the Municipality of Lajas.

I, Rafael V. Perez Marchand, of full age, resident of Ponce, attorney-at-law, as counsel for the defendant-appellee, Municipality of Lajas, de hereby certify:

That there is between San Juan and Ponce a daily mail service and that on this date I have deposited in the United States post office at Ponce an envelope duly postpaid, addressed to the attorney for the appellants, O. B. Frazer, Esq., San Juan, Puerto Rico, and that said envelope contained a true and faithful copy of the preceding answer.

Rafael V. Perez Marchand, Attorney for the Defendant-Appellee.

[File endorsement omitted.]

BEFORE PUBLIC SERVICE COMMISSION OF PUERTO RICO

INTERLOCUTORY ORDER

Considering in detail that the conditions existing in the so-called Valley of Lajas make it necessary to take urgent measures to counteract the damages which the residents and neighbors of said zone have been suffering as a consequence of the flood of said valley;

Considering that in accordance with the report rendered by Dr. Antonio Arbona, Medical Inspector of the Bureau of Malaria of the Health Department of Puerto Rico, it appears that the immediate and partial drainage of this pond is feasible; inasmuch as in said report the following appears:

"That the height of the waters, both in the lake and in [fol. 47] the flooded region, over the level of the sea was 12.74 feet (3.883 meters), the first of July, on which date the inspection was made;

"That the height of the bottom of the lake in its lowest side, over the level of the highest tide was 3.88 feet (1.18 meters), the result being that the difference between the two heights gives 8.86 feet of water (2.70 meters) in the deepest part of the lake.

"That the height of the bottom of Angostura or Carril, as this place is also known, which is the actual communication between the lake and the Anegado (flooded region) was 5.20 feet (1.59 meters), over the highest tide in the deepest part, and deducing this from the 12.74 feet (3.883

meters) above mentioned, shows a difference of 7.64 feet (2.30 meters) of water in the deepest place;

"That the average height of the bottom of Anegado (flooded region) was 10.12 feet (3.09 meters) which deducted from the 12.74 feet (3.883 meters) above mentioned, gives a balance of 2.62 feet (0.80 meters), as the average depth of Anegado; taking into consideration that these 2.62 feet (0.80 meters) do not apply to the natural ponds existing within the Anegado.

"That the above figures show how easily the Anegado would be drained by gravity, and to that end it will be necessary to lower the level of the lake 2.62 feet (0.80 meters), plus another foot (0.30 meter) to ensure an efficient work, and this would leave water in the deepest ponds, like that of Angostura, alone, the area of which would offer no danger of malaria, as the same could be overcome by using germicides, there being no need of altering any further than as above stated the height of the waters of the lake.

"If this is done, 5.24 feet (1.60 meters) of water would remain in the deepest part.

"It is well known that the height of the lake in its lowest side is 3.88 feet (1.18 meters) over the level of the highest tide, and that the length of Negros Pond, which seems to be [fol. 48] the natural outlet of the lake is about 3,900 lineal meters (12,792 feet) from end to end, between the sea and the lake, this will give us a difference in height of .000304% in times of high tides, in order to entirely drain it, if so desired. But the only object being to lower the level of the lake 3.62 feet (1.105 meters) in order to secure the drainage of the Anegado (flooded region) by gravity, we have then a difference in height of 9.12 feet (1.78 meters, sic.) between the desired level and the highest tide, which distributed among the 3,900 lineal meters (12,792 feet), the length of the pond, will give us a gradual descent of .000712%, this being more than enough for the object we have in view.

"By reason of the foregoing data, without entering into further details with regard to declivities, the consideration of the necessary works should be begun, and an approximate budget for carrying them out should be prepared.

"Wherefore the Public Service Commission of Puerto Rico requests: Russell & Company, Sucrs., S. en C.; Ensenada Estates, Inc., and its assignees; Guanica Central, and its assignees; and any other person or legal entity which may have acquired rights, by assignment or purchase, of the above entitled franchise; to—taking into consideration the details appearing in the preceding report—prepare a draft of the works to be done with the object of lowering the level of the waters of the lake until this level reaches a point equivalent to one foot lower than the lowest point, in the place known as Angostura; it being understood that this report of the works to be carried out should be made within 10 days from the date this order is served, and that the measure adopted is purely and simply an emergency measure, whose principal object is to remedy the immediate situation of the zone in question, and that this in no wise will prejudice the questions involved in this case; and it being understood, furthermore, that the draft of the works shall contain an estimate of their cost as well as of the time that it will be required to drain the lake by means of said works."

[fol. 49] This order was entered with the unanimous vote of the Commissioners present, there being a quorum.

San Juan, Puerto Rico, December 17, 1928.

Miguel A. Munoz, President. Attest: L. F. de Vizcarrondo, Secretary.

Copy of this order was sent on the 19th day of December, 1928, to Attorney O. B. Frazer, San Juan; Attorney R. V. Perez Marchand, Ponce; Mr. Juan N. Matos, Lajas; Hon. Mayor, Lajas, Hon. Mayor, Guanica.

Luis Freyre Diaz, Deputy Secretary.

In District Court for the Judicial District of San Juan, Puerto Rico

Civil Number 9192

Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, as Partners of the Civil Agricultural Partnership Russell & Company, Sucrs., S. en C., Plaintiffs,

v.

Public Service Commission of Puerto Rico, Defendant

Appeal from an Order of the Public Service Commission of Puerto Rico

Civil Number 9193

Municipality of Guanica, Plaintiff,

v.

Public Service Commission of Puerto Rico, Defendant

Appeal from an Order of the Public Service Commission of Puerto Rico

Statement of the Case and Opinion

Though two separate appeals have been presented to this court, as they both refer to the same matter and have been taken from the order entered by the Public Service Commission of Puerto Rico under date of March 8, 1929, in case [fol. 50] number J2763 of said Commission, we shall consider and decide the said two appeals jointly.

The facts of this case are briefly as follows: The Executive Council of Puerto Rico, on March 19, 1901, granted to an entity known at the time as Guanica Land Company, franchise number five, entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica". (Exhibit A, joined to the petition for appeal in case Number 9192, contains a full copy of this franchise.)

The appellants, as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C., allege that they are the actual holders of said franchise.

The Municipality of Lajas, Puerto Rico, through its Municipal Assembly, in a special session held February 24, 1928, adopted a resolution approved by the mayor October 27th of said month and year, the final part of which reads thus:

"Therefore, be it resolved by the Municipal Assembly of Lajas, Puerto Rico:

"I. To complain before the Public Service Commission of Puerto Rico and before the Commissioner of the Interior of Puerto Rico that the engineering works carried out on Negro Pond of Guanica Lake are causing irreparable damages to the Municipality of Lajas, by throwing the waters of Guanica Lake beyond their highest level; by invading, as they have municipal roads numbers 9 and 10 of this jurisdiction, and by making the life of the residents and real estate owners of the wards of Costa and Plata impossible, and in order that an investigation of the case be made by the proper party so as to protect the interest of one of the richest regions of Puerto Rico and the health and life of this community.

[fol. 51] "II. To send a certified copy of this resolution to the Hon. Public Service Commission of Puerto Rico, another copy to the Hon. Governor of Puero Rico and a third one to the Commissioner of the Interior for their information and control.

"III. This resolution being of an urgent nature will become effective immediately after its approval by the Hon. Mayor, and repeals and annuls any other resolution, ordinance or proclamation contrary thereto."

The Hon. Horace M. Towner, the then Governor of Puerto Rico, transmitted to the president of the Public Service Commission an official letter dated May 22, 1928 (Exhibit D), accompanying another letter from the Commissioner of the Interior, Mr. Esteves, of the same date (Exhibit D) and recommending the Public Service Commission to take the corresponding action.

On May 26, 1928, the Public Service Commission entered an order addressed to the respondent Russell & Co., Sucrs.,

S. en C.; Ensenada Estates, Inc., and to their assignees; Guanica Central and its assignees, and to any other person who might have acquired rights, by grant or cession, on said franchise No. 5, commanding them to appear and show cause why the said franchise should not be totally cancelled by the Public Service Commission; June 4, 1928, at 2.30 P. M., was set for their appearance.

The hearing was postponed by reason of an injunction proceeding filed by the respondent before the Federal Court. This injunction proceeding was dismissed by said court, and its decision was affirmed by the Circuit Court of Appeals at Boston.

Finally, the order to show cause began to be heard before the Public Service Commission of Puerto Rico on November 27, 1928 and continued on the 18th, 19th, and 20th of February, 1929.

To said hearing before the Public Service Commission appeared: the Municipality of Lajas (complainant), Russell & Co., Sucrs., S. en C. (respondent) and the Municipality of Guanica, as intervenor and in opposition to the complaint.

[fol. 52] After the hearing ended, the Public Service Commission of Puerto Rico entered the following

"Order

"For the reasons stated in the report of the President of this Commission, dated March 7th, 1929, and for the conclusions reached therein—the said report being hereby approved and made a part of this order—the Commission, after carefully studying the record of this case and fully considering the matter.

"Orders the cancellation—as it hereby cancels—of that part of franchise number 5 which refers to the use of certain waters of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19th, 1901, entitled "A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica;

"Provided that this cancellation shall become effective June 30th, 1929. It is understood, furthermore, that in the

meantime the parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept.

"This order was rendered with the unanimous vote of the commissioners. Let the parties be notified.

"San Juan, Puerto Rico, March 8th, 1929.

Miguel A. Munoz, President of the Commission. Attest: L. F. de Vizcarrondo, Secretary."

Said order was notified to the parties in interest and in due course and form separate appeals were taken there- [fol. 53] from by Horace Havemeyer et als., as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C., and by the Municipality of Guanica.

At the request of the Public Service Commission of Puerto Rico the Municipality of Lajas was joined as a party defendant in these two cases, on appeal.

The hearing of these cases, on appeal, was held jointly before the District Court, after due setting, the 29th of October, 1929.

The appellants Russell & Co., Sucrs., S. en C., and the Municipality of Guanica (sic) appeared by their attorney O. B. Frazer, and the Public Service Commission through M. Rodriguez Serra, Esq., Assistant Attorney General.

The return containing all the evidence adduced and all the proceedings which took place during the hearing of these cases before the Public Service Commission was duly brought up to this District Court.

At the hearing the appellants requested this District Court to take an ocular view of the place, and the court hereby denies the said petition, as it is of the opinion that the same is unnecessary, inasmuch as from the testimony of the witnesses and especially from the considerable number of photographs taken into consideration by the Public Service Commission, which have been forwarded to this District Court, this court is fully cognizant of the conditions existing in that region, there being no need of seeing the same personally.

The cases were submitted to the consideration and determination of this District Court through written briefs. The same were presented on the following dates: That of the appellants, December 23, 1929; that of the Public Service Commission, January 22, 1930, and that of the Municipality of Lajas on March 1, 1930.

The two cases which this District Court of San Juan has now under consideration are of its own exclusive jurisdiction. No other District Court of the island may consider this class of appeals, in view of the fact that Section 78 of the Public Service Act (No. 70 of December 6, 1917) has so expressly provided.

[fol. 54] Before deciding these appeals we must state, that we are of the opinion that in these special cases, taking into consideration the provisions of Act No. 70 of 1917, and especially in accordance with Sections 83, 84, 85 and 86 thereof, the sole duty of this court is to review, the same as is done by the Supreme Court in considering appeals from the District Courts, all of the evidence presented before the Public Service Commission, which has been forwarded to this District Court in the transcript of the record, and, consequently, to determine and decide:

"1. Whether the order appealed from, rendered by the Public Service Commission on March 8th, 1929, is reasonable or not.

"2. Whether said order is legal or not.

"3. Whether it has been based on incompetent evidence, affecting the decision and order of the Commission."

The appellants in their petition for appeal assign errors which they claim were committed by the Public Service Commission in entering the order which is the basis of the appeals.

The appellant, Russell & Co., Sucrs., S. en C., in its petition alleges that the Public Service Commission committed 24 errors, which are separately assigned; and the other appellant, Municipality of Guanica, assigns similarly 11 errors.

Once the foregoing explanations have been made, we shall now decide jointly the two appeals taken.

The learned counsel for the Public Service Commission raises in his brief a very important question which is briefly as follows:

"That the appellants, who are members of the partnership Russell & Co., Sucrs., S. en C., are not a public service corporation in accordance with the provisions of Section two of Act No. 70 of 1917, nor in accordance with par. XXI of the franchise, which literally quoted reads thus:

" 'Nothing herein in this grant contained, shall be construed to give the said Company, or its successors, or to the assigns in whole or in part of any of the rights and *and* privileges herein granted, the right, directly or indirectly, [fol. 55] with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.' "

We incline to the view that the learned counsel of the Public Service Commission is absolutely right in his theory, and we might perhaps be inclined to dismiss the appeals without considering other questions.

But it is logical to suppose that if an Appellate Court decided that we are mistaken in upholding the viewpoint of counsel for the Public Service Commission, our judgment would be reversed and the case remanded to this District Court in order that the appeals be decided on the merits, and for this reason and with the object of obviating delays in the administration of justice, in cases similar in nature to the one at bar, we shall consider and decide the said appeals on the merits.

We agree with counsel for the appellant when he states at pages 4 and 5 of his brief that all the errors imputed to the Public Service Commission in ordering the cancellation of the franchise, may be summarized as follows:

"1. That the Public Service Commission erred in assuming that it had jurisdiction over the subject matter and over the parties.

"2. The Commission erred in holding that there was sufficient legal ground to authorized the cancellation of the franchise.

"3. The Commission erred in holding that the remedy by suit granted by par. 4 of the franchise was not the sole remedy, for the facts alleged by the complainants.

"4. The Commission erred in holding that the appellants [fol. 56] had not taken all the necessary steps to remedy the situation prior to the hearing before the Public Service Commission."

We shall discuss and decide them according to their order.

We are of the opinion that the first and second errors assigned have not been committed, as held by the Circuit Court of Appeals of Boston, whose opinion we quote in toto hereinafter:

"On May 28, 1928, the Public Service Commission of Porto Rico issued to appellants an order of notice to appear on June 4, 1928, and show cause why said commission should not cancel a franchise granted, on March 19, 1901, to appellant's predecessors in title, by the Executive Council of Porto Rico, to use daily 20,000,000 gallons of the waters of Lake Guanica for irrigation, for the construction and operation of a private railroad to run in part over lands subject to public rights, and to construct and maintain a dock on the Bay of Guanica. Without appearing before the commission, the appellants filed on June 2, 1928, a bill in equity seeking an injunction to restrain the commission from interfering in any way with the enjoyment of their powers under this franchise, and from asserting any jurisdiction over the appellants in respect to said franchise. The court below sustained a motion to dismiss filed by the Attorney General of Porto Rico, holding, in a well-reasoned and cogent opinion, both that the suit was premature and that the Public Service Commission had jurisdiction. This decision was right on both points.

"(1) Courts have no general supervisory power over such tribunals as public service commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon property rights. American Coal Mining Co. v. Special Coal & Food Commission (D. C.), 268 F. 563; Sayers v. Montpelier & Wells River R. R., 90 Vt. 201, 97 A. 660, Ann. Cas. 1918 B, 1050.

"(2) If we assume for the moment that this Public Serv-
[fol. 57] ice Commission has no jurisdiction, the issuance of an order of notice was no such assertion of authority or threat of irreparable injury as to warrant injunctive interference by the court. It would not follow that, on appearance and argument, the commission would adhere to an erroneous view as to the nature and extent of its jurisdiction. The appellants' case in that regard is not supported by the cases relied upon by their learned counsel. Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, and cases cited; Work v. Louisiana, 269 U. S. 250, 46 S. Ct. 92, 70 L. Ed. 259; Gallardo v. Porto Rico Light & Power Co. (C. C. A.), 18 F. (2nd) 918; Benedicto v. West India & Panama Tel. Co. (C. C. A.), 256 F. 417.

"Affirmation of the decree below (dismissing the bill) would doubtless be warranted on this ground alone. But it is plainly in the interest of the parties that we deal now, rather than possibly in a later suit, with the fundamental question of the jurisdiction of the commission to maintain proceedings looking to the repeal, alteration or modification of the appellant's franchise.

"Under the first Organic Act of Porto Rico—the Foraker Act of April 12, 1900, 31 Stat. 77, (48 U. S. C. A., Sect. 731 et seq.)—Congress provided for this recently acquired possession a legislative assembly, consisting of an elective lower chamber, and, in lieu of a senate, an Executive Council, consisting of six heads of the executive departments, appointed by the President. At the end of the section 31 it was enacted:

" 'Provided, however, that all laws enacted by the legislature assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same.'

"Section 32 reads:

" 'That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to * * * repeal any and
[fol. 58] all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: Pro-

vided, however, that all grants of franchises, rights, and privileges or concessions of a public or quasi public nature shall be made by the executive council, with the approval of the Governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.'

"Franchises and laws were both thus required to be reported to Congress, which reserved power to annul either or both.

"Under the joint resolution of May 1, 1900, 31 Stat. 715, amending the Foraker Act of April 12, 1900, it was provided:

" 'That all franchises, privileges or concessions granted under section 32 of said act shall provide that the same shall be subject to amendment, alteration or repeal.'

"This was the familiar provision intended to meet the doctrine of the Dartmouth College Case. Pursuant to these powers, the Executive Council the next year (1901) granted the franchise in question, providing in article XVIII 'that the franchises, privileges and concessions hereby granted shall be subject to amendment, alteration or repeal.'

"The same general power to annul laws enacted by the Legislature of Porto Rico is retained in section 34 of the Second Organic Act—the Jones Act of March 2, 1917, 39 Stat. 951. 48 U. S. C. A., Sect. 822 et seq. In thus reserving in both Organic Acts power to annul laws enacted and franchises granted by the Porto Rican government, Congress acted in close analogy to its long-continued practice with relation to territories within the boundaries of the present United States—prospectively states. Compare the Organic Act of Oregon, 9 Stat. 323, Sect. 6; of Minnesota, 9 Stat. 403; of New Mexico, 9 Stat. 446; of Utah, 9 Stat., 453; of Washington, 10 Stat. 172. The purpose obviously, [fol. 59] both in Porto Rico and with our own territories, was to provide a quasi guardianship during a probative period, over a developing political society, by requiring full reports (itself a sobering check) of all important performances of the local government, and by reserving power to annul any act sinister or dangerously foolish, in origin or in effect.

"The new Organic Act substantially changed the form of government by providing for an elected Senate, having, in

general, the legislative powers previously exercised by the abolished Executive Council. Compare section 12. It also provided in section 38 for a Public Service Commission, and enacted:

" 'The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same.' 48 U. S. C. A., Sect. 750.

"Congress thus apparently vested full control over franchises, old and new, in the Public Service Commission.

"But the Jones Act also vested in the Porto Rican Legislature (compare sections 25 and 37) general legislative authority over all matters of a legislative character not locally inapplicable or inconsistent with the provisions of the Organic Act. Under this power, the Legislature, by Act No. 70, approved December 6, 1917 (Laws of Porto Rico, Vol. 2, pp. 432-546) Section 60, enacted:

" 'Section 60. Violation of existing franchises. Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council and is now in force: Provided, however, That the commission shall have the power to alter, amend, modify, or repeal such franchises, and shall exercise all the [fol. 60] rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law.'

"(3) This law was of course reported to Congress and it has not been annulled. This has some tendency to show approval by Congress. Chuoco Tiaco v. Forbes, 228 U. S. 549, 558, 33 S. Ct. 585, 57 L. Ed. 960; Fajardo Sugar Co. v. Holcomb (C. C. A.) 16 F. (2nd) 92, 96.

"It is thus clear, and appellants' learned counsel concedes, that the Jones Act or the Legislature of Porto Rico, or both together, vested in the Public Service Commission all powers over franchises originally vested in the Executive Council.

"(4) The appellants' contention of no jurisdiction in that commission, therefore, rests entirely on the proposition,

that Congress reserved to itself alone jurisdiction to repeal or amend franchises granted by the Executive Council. It grounds this proposition on the reservation contained in section 32 of the Foraker Act, supra: 'All franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.' Necessarily this contention also asserts the invalidity of that portion of section 60 of the Act of Porto Rico, No. 70, approved December 6, 1917, supra, which explicitly provides that the Public Service Commission shall have the power to alter, amend or repeal franchises previously granted by the Executive Council.

"We cannot adopt this construction of the general reservation by Congress of the power to annul all franchises and laws of the experimental local government set up by Congress in Portio Rico. We are constrained to hold that the purpose of Congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when Congress sees fit. The reservation of the power to annul franchises granted by the Executive Council is in the same general terms as the reservation of the power to annul all laws. [fol. 61] It did not in 1901 exclude the power granted by fair and necessary implication to the Executive Council to modify or repeal franchises granted by that council. The like reservation contained in the Jones Act does not exclude or cut down the power of the Public Service Commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation.

"The decree of the District Court is affirmed, with costs to the appellees in this court."

We hold that the third error has not been committed, inasmuch as the fact that the parties prejudiced may be indemnified through legal actions, can in no wise deprive the Public Service Commission of the authority and of the duty expressly imposed by the Organic Act of repealing or annulling franchises when there are sufficient merits for so doing.

With regard to the fourth and last error, we are of the opinion that it cannot be held that the same has been committed.

In effect, from the letter dated May 22, 1928, addressed by the Commissioner of the Interior to the Governor of Puerto Rico (Exhibit D) the following appears:

"* * * that according to the records of our files, the Guanica Land Company never submitted plans of the works to be done across 'Cano Negro.' There is no record that the customary level of Guanica Lake during rainy seasons at the time the franchise was granted, was ever determined. From the investigation we have been able to ascertain that several municipal roads of the Municipalities of Lajas and Guanica, since 1926, are flooded and that considerable amount of private lands are at present well under water, and to our knowledge none of the damages sustained by abutting owners have been borne by said Guanica Company."

Section 1 of the franchise authorizes the grantee to construct and operate a dam of masonry work or other materials across the Cano Negro or outlet from Guanica Lake and upon public lands of abutting owners as may have been [fol. 62] acquired for the purpose of retaining and regulating the flow of the waters from said lake, or for the purposes otherwise specified. By virtue of the franchise, the grantee or its successors assumed control of the flow of the waters from the lake and the power to raise the level of the waters from the lake remained exclusively in its own hands. As it has been seen, the grantees never complied with the duty—voluntarily contracted by them in accepting the franchise—of submitting plans of said works to the Commissioner of the Interior. And said works have been done and they have taken waters on certain occasions in such a way, as for example in 1914 and in 1922, and specifically from and after July 1926 till May 1928, on which date the Public Service Commission ordered them to show cause, as has been already stated (Exhibit B) why they allowed the level of the waters of Guanica Lake to raise to a level higher than the customary one thereof during the rainy season in years of average and usual rainfall, thus violating the provisions of section 4 of the franchise.

Such an excess of water in the lake over and above the customary level in years of average rainfall, flooded to an average depth of two or three feet of water a zone of lands whose area varies between five and six thousand cuerdas,

in the Municipality of Lajas, thus causing grave injury to the owners of the lands flooded and to the community in general. The flood spread and covered the municipal roads known as Fabiani and Don Mariano, and partially interrupted communication with the railroad station of the American Railroad Company in the ward of La Plata of said municipality.

These facts were shown to the satisfaction of the Commission with the enormous amount of evidence which this court has seen in the transcript of record: with the evidence of expert engineers from the Department of the Interior who made special investigations, and with the testimony of witnesses, etc.

We decide and hold that the order of the Public Service Commission of March 8, 1929, was issued with full authority and that the same is reasonable, correct and justified, being based on the legal reasons which we quote hereinafter:

[fol. 63] Section 54 of Act No. 70 of 1917 reads:

"Grants subject to repeal and alteration. All grants of franchises, rights, privileges or concessions shall be subject to amendment, alteration or repeal by the commission, and shall provide for the same."

This section is a reproduction of the provisions contained under Section 39 of the Organic Act of March 2, 1917, as follows:

"That all grants of franchises and privileges under the section last preceding shall provide that the same shall be subject to amendment, alteration, or repeal, etc."

And of the Joint Resolution of the Congress of the United States, approved May 1, 1901, Section 3:

"That all franchises, privileges and concessions granted under Section 32 of the said Foraker Act shall provide that the same shall be subject to amendment, alteration or repeal."

And Section 60 of the Public Service Act, No. 70, reads:

"Violation of existing franchises.—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council

and is now in force; Provided, however, That the commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law."

See also South Porto Rico Sugar Co. et al. v. Munoz et al., supra, 28 Fed. (2d) 820.

The appellants do not allege that the order appealed from is based on incompetent evidence. The record shows that the Commission had before it abundant evidence offered by the parties, and that it handed its decision after considering said evidence. Neither in the petition for appeal nor in the brief for the appellants any error is assigned for admitting evidence which was legally incompe- [fol. 64] tent and which materially affected the decision of the case.

Section 84 of Act No. 70 of 1917 provides:

"Orders as evidence—Burden of proof.—In all such cases the orders of the commission shall be prima facie evidence of the reasonableness thereof, and the burden of proving the contrary shall be upon the appellant or appellants; * * *."

"The reasonableness of an order of the Public Service Commission depends on whether it is arbitrary, capricious, or unlawful. State ex rel. Ozark Power and Water Co. v. Public Service Commission of Missouri, 229 S. W. 782, 287 Mo. 522.

"Findings of the Public Service Commission are presumptively correct." Chesapeake & Potomac Telephone Co. v. Whitman, 3 Fed. (2d) 938.

"Findings of the Public Utilities Commission should not be disturbed by the Supreme Court as being against the weight of the evidence, unless they are so manifestly against the weight of evidence and so clearly unsupported by it as to show misapprehension, mistake, or willful disregard of duty. Village of St. Clairsville v. Public Utilities Commission, 132 N. E. 151, 102 Ohio St. 754.

"* * * when the Public Service Commission makes an order within the purview of its statutory powers, it will be deemed reasonable and just, and a court will not prevent its enforcement unless it clearly appears that it is unjust

and unreasonable." Alabama Great Southern R. Co. v. Alabama Public Service Commission, 97 So. 226, 210 Ala. 151.

"Orders of the Commerce Commission are entitled to great weight, and can be set aside only if arbitrary or unreasonable, or in clear violation of law, and courts should review or interfere with them only so far as necessary to keep them within their jurisdiction and protect constitutional rights." Wabash C. & W. Ry. Co. v. Commerce Commission, 141 N. E. 212, 309 Ill. 412.

[fol. 65] "A court is not authorized to put itself in the place of the Commerce Commission, try the question anew, and substitute its judgment for that of the Commission. Id. Id.

"Findings of the Public Utilities Commission have the force and effect of reports of special masters in courts of equity, and are conclusive on courts, unless manifestly against evidence." State Public Utilities Commission, ex rel. Chicago Board of Trade, v. Toledo, St. L. & W. R. Co., 122 N. E. 158, 286 Ill. 582.

"In direct appeals to the Supreme Court from direct orders of the railroad commission, such orders will not be reversed unless it affirmatively appears from the record that they are clearly wrong." In re Southern Nebraska Power Co. v. Taylor et al., 192 N. W. 317-318, 109 Neb. 683.

We adopt, with approval, the following statements contained in the brief for the Public Service Commission:

"The order appealed from by itself shows its reasonableness.

"While it orders the cancellation of that part of the franchise which refers to the use of certain waters, it is at the same time liberal and benevolent as it leaves the parties in interest at liberty to file whatever new petitions with regard to the use of the waters they may deem wise and to submit to the Commission specific data as to the maximum height, as well as the drafts of any works that may be done to keep the waters at a permanent level.

"Being compelled to take serious steps in order to protect the inhabitants and the owners of the valley of Lajas from the acts of the holder of the franchise, the Commission did the least that it could do, namely: deprive them of the legal means with which they could continue causing in-

jury, but at the same time it gave them a new opportunity for using the waters with the assurance that such state of affairs as the one which gave rise to the order appealed from would not be repeated.

[fol. 66] "The court, after a careful examination of the record of this case, reaches the following conclusions:

"That the order appealed from, dated March 8th, 1929, is reasonable and agreeable to law."

For the foregoing reasons and considering Section 85 of Act No. 70 of 1917, the court is of opinion that judgment should be rendered dismissing the appeal taken in each of these cases and affirming the order rendered by the Public Service Commission on March 8, 1929, in case No. J2763, and sentencing the appellants to the payment of costs.

Let separate judgments be rendered in each case, in conformity with the terms of this opinion, and let the necessary writs and orders issue to make them effective.

San Juan, Puerto Rico, June 4, 1930.

Domingo Sepulveda, Judge.

IN DISTRICT COURT OF SAN JUAN

JUDGMENT

The hearing of this case on appeal was held before this District Court, after due setting in the calendar, the twenty-ninth day of October, 1929. The appellants, Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold and Henry B. Orde, as partners of the civil agricultural partnership, Russell & Co., Sucrs., S. en C., appeared by their counsel O. B. Frazer, Esq., and the Public Service Commission by M. Rodriguez Serra, Esq., Assistant Attorney General.

The appellants requested that an ocular inspection be taken and the same was denied for the reasons stated in the foregoing opinion; no additional evidence was presented, the case having been decided on the return brought up to this court, which contains all the evidence adduced, as well as all proceedings which took place during the hearing of this case, before the Public Service Commission. The case was submitted through written briefs presented in due course.

The court hereby, and for the reasons stated in the opin-
[fol. 67] ion delivered on this date, joined to the record and made a part thereof, renders judgment dismissing the appeal taken herein and affirming the order entered by the Public Service Commission on March 8, 1929, in case No. J2763, which literally quoted reads thus:

"Order

"For the reasons stated in the report of the President of this Commission, dated March 7th, 1929, and for the conclusions reached therein—the said report being hereby approved and made a part of this order—the Commission, after carefully studying the record of this case and fully considering the matter,

"Orders the cancellation—as it hereby cancels—of that part of franchise No. 5 which refers to the use of certain waters of Guanica Lake for purposes of irrigation, granted by the former Executive Council of Puerto Rico on March 19, 1901, entitled 'A form of franchise to the Guanica Land Company for the use of certain waters for purposes of irrigation of its lands, and also for the construction of a wharf in the harbor of Guanica, and also for the construction and operation of a private railway along certain portions of the harbor of Guanica';

"Provided that this cancellation shall become effective June 30th, 1929. It is understood, furthermore, that in the meantime the parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake, by submitting to this Commission specific data with regard to the highest level of the waters of the lake, as well as the plans of any other works, in order that this level may be permanently kept.

"This order was rendered with the unanimous vote of the commissioners. Let the parties be notified.

"San Juan, Puerto Rico, March 8th, 1929.

Miguel A. Munoz, President of the Commission. Attest: L. F. de Vizcarrondo."

[fol. 68] All of the above is known to the appellants.

Let this judgment be entered in the corresponding register of this court and let the necessary writs issue to make it effective.

San Juan, Puerto Rico, June 4, 1930.

Domingo Sepulveda, Judge.

IN DISTRICT COURT OF SAN JUAN

NOTICE OF APPEAL—Filed June 26, 1930

To the Clerk of the Court; to the Public Service Commission of Puerto Rico; to the Municipality of Lajas, P. R., and to the Attorney General of Puerto Rico, as Attorney for the Commission, and to Rafael V. Perez Marchand, Esq., as Attorney for the Municipality of Lajas, P. R.:

SIRS:

Please take notice that the plaintiffs, feeling aggrieved by the judgment rendered and entered in the above-entitled case of June 4, 1930, appeal therefrom to the Supreme Court of Puerto Rico.

San Juan, Puerto Rico, June 26, 1930.

O. B. Frazer, R. Castro Fernandez, Attorneys for the Plaintiffs.

Copy served this twenty-sixth day of June, 1930.

James R. Beverley, Attorney for the Public Service Commission.

I, R. Castro Fernandez, being duly sworn, depose and say:

That I am one of the attorneys for the plaintiff; that on this date I have deposited in the post office of this city an envelope, duly postpaid, addressed to Rafael V. Perez Marchand, Esq., Ponce, Puerto Rico, who is the attorney of record for the Municipality of Lajas, Puerto Rico, and that said envelope contained a true and faithful copy of the foregoing notice of appeal; that there exists a daily mail service between San Juan and Ponce.

San Juan, Puerto Rico, June 26, 1930.

R. Castro Fernandez.

[fol. 69] Sworn to and subscribed before me by R. Castro Fernandez, of full age, married, attorney at law, and resident of this city, to me personally known, this twenty-sixth day of June, 1930.

P. N. Colberg, Clerk, by P. del Manzano, Deputy Clerk.

[File endorsement omitted.]

IN DISTRICT COURT OF SAN JUAN

CERTIFICATE OF COUNSEL AND STIPULATION AS TO RECORD

We, O. B. Frazer and R. Castro Fernandez, attorneys for the petitioners-appellants; James R. Beverley, Attorney General of Puerto Rico, and M. Rodriguez Serra, Assistant Attorney General, attorneys for the Public Service Commission; and Rafael V. Perez Marchand, attorney for the Municipality of Lajas, Puerto Rico, do hereby certify:

That the foregoing is a true and faithful copy of the record before the District Court of San Juan in the present case, with the exception of Exhibits 1 to 7, inclusive, which were accompanied to the transcript of the evidence presented before the Public Service Commission, the same containing photographs, plans, etc., which may not be transcribed, for which reason the parties stipulate and agree that the originals thereof be transmitted to the Supreme Court. And in order that the appellants may perfect their apeal, we certify and subscribe these presents, in San Juan, Puerto Rico, this eleventh day of August, 1930.

O. B. Frazer, R. Castro Fernandez, Attorneys for the Petitioners-Appellants. James R. Beverley, Attorney General of Porto Rico; M. Rodriguez Serra, Assistant Attorney General of Puerto Rico, Attorneys for the Public Service Commission of Puerto Rico. R. V. Perez Marchand, Attorney for the Municipality of Lajas, Puerto Rico.

[fol. 70] IN SUPREME COURT OF PUERTO RICO

No. 5401

HORACE HAVEMEYER et als., Plaintiffs-Appellants,

v.

PUBLIC SERVICE COMMISSION OF PUERTO RICO and MUNICIPALITY OF LAJAS, Defendants and Appellees

Appeal from the District Court of San Juan

OPINION OF THE COURT, DELIVERED BY MR. JUSTICE ALDREY—San Juan, Puerto Rico, November 9, 1933

The civil agricultural partnership Russell & Company, Sucrs., S. en C., by its partners Horace Havemeyer and

others, as grantee of certain rights which the Guanica Land Company had in a franchise, appealed to the District Court of San Juan from a decree of the Public Service Commission of Puerto Rico canceling the said franchise, in so far as it referred to the right of taking a certain amount of water from Guanica Lake. The District Court affirmed this decree of the Commission and dismissed the appeal taken therefrom. Russell & Company appealed from that judgment to this court. The partnership based its appeal to the district court on Section 78 of Act No. 70 of 1917, the short title of which is "The Public Service Act of Porto Rico"; its appeal to this court being based on Section 90 of said law.

The above cited law provides that the District Court of San Juan, to which exclusive jurisdiction is granted, shall decide such appeals upon the record certified to it by the Commission: that the question to be determined is whether or not the order appealed from is reasonable, in conformity with the law and based on competent evidence: that in all such cases the orders of the Commission shall be prima [fol. 71] facie evidence of the reasonableness thereof; that the burden of proving the contrary shall be upon the appellant or appellants, and that if the court shall upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the Commission.

From a certified copy of the record of the Commission which was presented to the District Court and is now before us, the following appears:

The Executive Council of Puerto Rico granted in 1901 to the corporation Guanica Land Company, and to its grantees, franchise number 5, whereby it was authorized to construct a private railway over public lands and a wharf in the port of Guanica, and to use twenty million gallons of water daily from Guanica Lake for the proper irrigation of the lands owned or leased by it. We quote some of the clauses of this franchise, to wit:

"1. That the Guanica Land Company, (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns be and they are hereby authorized and empowered to erect, construct, maintain and operate a dam of masonry work or

other proper materials across the Cano Negro, or outlet from the Lake of Guanica, in the Municipality of Yauco and upon such lands of abutting owners as may have been acquired by consent or by process of law, for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said lake, through the said Cano or otherwise, for the purposes hereinafter set forth.

"2. That the said Company and its successors and assigns be and they are hereby authorized to take from the said Lake of Guanica, or from the said cano or outlet, such quantity of water, not exceeding 20,000,000 gallons during each day, as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased by the said company, or by its sucecssors or assigns, or any [fol. 72] of them. The water so to be taken from the said lake or cano may be taken from such part or parts thereof, adjacent or contiguous to said lands, as the said Company or its successors or assigns may see fit, and may be taken by gravity through proper channels, or by pumps, or by any other method that may be advisable, or by any two or more of such methods.

"3. That the said company and its successors and assigns may erect, construct, operate and maintain upon those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said cano, or within twenty meters of the shore of the said lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters; provided, that no public road lying within or partly within said limits shall be obstructed to any extent thereby.

"4. That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said lake, shall be borne by the said Company, *its waters of said lake, shall be borne by the said Company,* its successors and assigns and action for damage shall lie

against said company, it successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction."

Twenty-seven years after said franchise was granted, the Municipal Assembly of Lajas adopted a resolution whereby it complained before the Public Service Commission and before the Commissioner of the Interior that the engineering works carried out in Cano Negro of Guanica Lake are causing irreparable damages to the Municipality [fol. 73] of Lajas by throwing the waters of Guanica Lake beyond its highest level, by invading municipal roads and by making the life of abutting neighbors and landowners in the wards of Costa and Plata impossible. In view of this complaint and after a certain investigation was made by the president of the Commission, the latter ordered that the holders of said franchise appear before the Commission to show cause why the same should not be canceled. The civil agricultural partnership Russell & Company appeared by its members Horace Havemeyer and others, as sole owners, by purchase, of that part of the franchise which refers to the use of the waters of Guanica Lake, objected to its cancellation or modification, and alleged also that the Commision lacked jurisdiction to cancel or modify the said franchise.

It appears, moreover, that Guanica Lake had a pond known as Negro or Los Negroes, 3,900 meters or 12,792 feet long, which connects it with the sea; that in 1928 this pond was entirely shut off for a length of three hundred meters, beginning from the lake, and that the remainder of the pond up to the sea was perfectly visible; that the bottom of the lake is higher than the level of the high tides of the sea: that there is in the valley of Lajas a place known as "El Anegado", the bottom of which is higher than that of the lake, and that there exists between El Anegado and the lake, which are two distinct bodies, a pond which connects them, known as "Angostura" or "Carril"; that El Anegado had been flooded several times prior to 1926 but had dried a few months later; that since the middle of 1926 and during the years 1927 and 1928 El Anegado has been flooded and has formed a single body with the lake, and that about four or five thousand acres of land and many private properties of considerable area are under water, some of them being absolutely flooded and others almost totally.

That from and after the year 1926 two municipal roads have been under water for about seven or eight kilometers; that diseases have increased in that region; that in the margins of Loco River, which flows in the lake near Negro Pond, works have been done to avoid its drainage; that the [fol. 74] government, the grantees or its successors have never determined what the ordinary level of the lake is; that while Negro or Los Negros pond is open El Anegado may be readily drained, and that water would still remain in the lake by reason of the difference in level existing between them, and that owing to the damages suffered by landowners, the holder of the franchise has granted the usufruct of certain properties to the landowners whose properties have been flooded.

When the Commission canceled the franchise on March 8, 1929, it ordered that the decree should become definitely effective June 30th of that year and that in the meantime the parties in interest be at liberty to file whatever new petition they deemed convenient for the use of the waters of Guanica Lake, by submitting to the Commission specific data as to the highest level of the waters of Guanica Lake, as well as the draft of any works, in order that said level might be permanently kept.

The claim of Russell & Company that the Commission lacks jurisdiction to cancel or modify the franchise was raised by the corporation South Porto Rico Sugar Company before the United States District Court for the District of Puerto Rico, when in an injunction proceeding it prayed that the said Commission be ref-rained from interfering in the case. This petition was denied and on appeal the United States Circuit Court of Appeals for the First Circuit said:

"On May 28, 1928, the Public Service Commission of Porto Rico issued to appellants an order of notice to appear on June 4, 1928, and show cause why said Commission should not cancel a franchise granted, on March 19, 1901, to appellants' predecessors in title, by the Executive Council of Porto Rico, to use daily 20,000,000 gallons of the waters of Lake Guanica for irrigation, for the construction and operation of a private railroad to run in part over lands subject to public rights, and to construct and maintain a dock on the Bay of Guanica. Without appearing be-

fore the commission, the appellants filed on June 2, 1928, a bill in equity seeking an injunction to restrain the Com- [fol. 75] mission from interfering in any way with the enjoyment of their powers under this franchise, and from asserting any jurisdiction over the appellants in respect to said franchise. The court below sustained a motion to dismiss filed by the Attorney General of Porto Rico, holding, in a well-reasoned and cogent opinion, both that the suit was premature and that the Public Service Commission had jurisdiction. This decision was right on both points.

"(1) Courts have no general supervisory power over such tribunals as public service commissions. Judicial interference, apart from express statutory delegation, must be grounded on illegal encroachment upon the property rights. American Coal Mining Co. v. Special Coal & Food Commission (D .C.), 268 F. 563; Sayers v. Montpelier & Wells River R. R., 90 Vt. 201, 97 A. 660, Ann. Cas. 1918 B, 1050.

"(2) If we assume for the moment that this Public Service Commission has no jurisdiction, the issuance of an order of notice was no such assertion of authority or threat of irreparable injury as to warrant injunctive interference by the court. It would not follow that, on appearance and argument, the commission would adhere to an erroneous view as to the nature and extent of its jurisdiction. The appellant's case in that regard is not supported by the cases relied upon by their learned counsel. Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, and cases cited; Work v. Louisiana, 269 U. S. 250, 46 S. Ct. 92, 70 L. Ed. 259; Gallardo v. Porto Rico Light & Power Co. (C. C. A.), 18 F. (2d) 918; Benedicto v. West India & Panama Tel. Co. (C. C. A.), 256 F. 417.

"Affirmation of the decree below (dismissing the bill) would doubtless be warranted on this ground alone. But it is plainly in the interest of the parties that we deal now, rather than possibly in a later suit, with the fundamental question of the jurisdiction of the commission to maintain procedings looking to repeal, alteration or modification of the appellant's franchise.

[fol. 76] "Under the first Organic Act of Porto Rico—the Foraker Act of April 12, 1900, 31 Stat. 77, (48 U. S. C. A., Sect. 731 et seq.)—Congress provided for this recently acquired possession a legislative assembly, consisting of an

elective lower chamber, and, in lieu of a senate, an Executive Council, consisting of six heads of the executive departments, appointed by the President. At the end of the section 31 it was enacted:

" 'Provided, however, that all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same.'

"Section 32 reads:

" 'That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to * * * repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof; Provided, however, that all grants of franchises, rights, and privileges or concessions of a public or quasi public nature shall be made by the executive council, with the approval of the Governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.'

"Franchises and laws were both thus required to be reported to Congress, which reserved power to annul either or both.

"Under the joint resolution of May 1, 1900, 31 Stat. 715, amending the Foraker Act of April 12, 1900, it was provided:

" 'That all franchises, privileges or concessions granted under section 32 of said act shall provide that the same shall be subject to amendment, alteration or repeal.'

"This was the familiar provision intended to meet the doctrine of the Dartmouth College Case. Pursuant to these [fol. 77] powers, the Executive Council the next year (1901) granted the franchise in question, providing in article XVIII 'that the franchises, privileges and concessions hereby granted shall be subject to amendment, alteration or repeal.'

"The same general power to annul laws enacted by the Legislature of Porto Rico is retained in section 34 of the Second Organic Act—the Jones Act of March 2, 1917, 39 Stat. 951. 48 U. S. C. A., Sect. 822 et seq. In thus reserv-

ing in both Organic Acts power to annul laws enacted and franchises granted by the Porto Rican government, Congress acted in close analogy to its long-continued practice with relation to territories within the boundaries of the present United States—prospectively states. Compare the Organic Act of Oregon, 9 Stat. 323, Sect. 6; of Minnesota, 9 Stat. 403; of New Mexico, 9 Stat. 446; of Utah, 9 Stat. 453; of Washington, 10 Stat. 172. The purpose obviously, both in Porto Rico and with our own territories, was to provide a quasi guardianship during a probative period, over a developing political society, by requiring full reports (itself a sobering check) of all important performances of the local government, and by reserving power to annul any act sinister or dangerously foolish, in origin or in effect.

"The new Organic Act substantially changed the form of government providing for an elected Senate, having, in general, the legislative powers previously exercised by the abolished Executive Council. Compare section 12. It also provided in section 38 for a Public Service Commission, and enacted:

" 'The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same.' 48 U. S. C. A., Sect. 750:

[fol. 78] "Congress thus apparently vested full control over franchises, old and new, in the Public Service Commission.

"But the Jones Act also vested in the Porto Rican Legislature (compare sections 25 and 37) general legislative authority over all matters of a legislative character not locally inapplicable or inconsistent with the provisions of the Organic Act. Under this power, the Legislature, by Act No. 70, approved December 6, 1917 (Laws of Porto Rico, Vol. 2, pp. 432-546) Section 60, enacted:

" 'Section 60. Violation of existing franchises.—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Exec-

utive Council and is now in force; Provided, however, That the commission shall have the power to alter, amend, modify, or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law.'

"(3) This law was of course reported to Congress and it has not been annulled. This has some tendency to show approval by Congress. Chuoco Tiaco v. Forbes, 228 U. S. 549, 558, 33 S. Ct. 585, 57 L. Ed. 960; Fajardo Sugar Co. v. Holcomb (C. C. A.) 16 F. (2d) 92, 96.

"It is thus clear, and appellants' learned counsel concedes, that the Jones Act or the Legislature of Porto Rico, or both together, vested in the Public Service Commission all powers over franchises originally vested in the Executive Council.

"(4) The appellants' contention of no jurisdiction in that commission, therefore, rests entirely on the proposition that Congress reserved to itself alone jurisdiction to repeal or amend franchises granted by the Executive Council. It grounds this proposition on the reservation contained in section 32 of the Foraker Act, supra: 'All franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.' Necessarily this contention also asserts the invalidity of that portion of section 60 of the Act of Porto Rico, No. [fol. 79] 70, approved December 6, 1917, supra, which explicitly provides that the Public Service Commission shall have the power to alter, amend or repeal franchises previously granted by the Executive Council.

"We cannot adopt this construction of the general reservation by Congress of the power to annul all franchises and laws of the experimental local government set up by Congress in Porto Rico. We are constrained to hold that the purpose of Congress was, experimentally and gradually, to vest in the Porto Rican government the general powers of state governments, subject to the reserved power to annul or modify franchises and laws if and when Congress sees fit. The reservations of the power to annul or modify franchises granted by the Executive Council is in the same general terms as the reservation of the power to annul all laws. It did not in 1901 exclude the power granted by fair and necessary implication to the Executive Council to

modify or repeal franchises granted by that Council. The like reservation contained in the Jones Act does not exclude or cut down the power of the Public Service Commission to repeal or alter franchises granted by it. Like the power to repeal statutes, the body that creates may alter or destroy the creation.

"The decree of the District Court is affirmed, with costs to the appellees in this court."

The first three errors assigned by the appellant as committed by the court below claim that the Commission has no authority, power or jurisdiction to cancel or modify the said franchise, and merely expound them without argument, inasmuch as this question has been decided by the Circuit Court of Appeals for the First Circuit, as we have already stated. We have examined the order appealed from and find that it is in accord with the law, for which reason we shall discuss some of the other grounds of the appeal.

It was neither claimed before the District Court nor before this court that the evidence admitted by the Commis- [fol. 80] sion in order to enter its decree is incompetent, for which reason the controversy is limited to a determination of whether such decree is reasonable or not and whether it is in accord with the law.

In order to attack the decree of the Commission and its affirmance by the court below, the appellant alleges in several of its assignments of error that clause four of the franchise does not impose on the appellant the duty to keep the water of the lake at a certain level, and that it is simply a clause explaining that the appellant is not authorized by the franchise to carry out any affirmative acts tending to raise or to keep the level of the waters of the lake higher than the customary level of same: that this clause does not clearly state that the appellant is bound to keep the level of the water at a certain height: that the franchise does not grant the appellant the exclusive power to use the waters of the lake, although it is true that there are no other persons taking great quantities of water therefrom, though one or two land owners use small quantities of water, but other concessions may be made; that there is no evidence whatever to show that the appellant has carried out any act tending to close Negro pond; and that although the pond was closed and eliminated, the Commission did not have the right to presume that the appellant is responsible of this

situation, unless it were shown that the appellant did something to create it and that according to the franchise it was its duty to avoid the same. The errors assigned by the appellant hinge on these questions.

Clause four of the franchise provides, as we have already seen, "that nothing herein contained shall be held or construed to authorize or permit the said company or its successors or assigns to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season." This clause not only prohibits the grantee from exceeding said level but it also compels the same to avoid the waters of the lake from exceeding said level, for which reason this franchise necessarily gave to the grantee and its successors the management and control of Negro Pond so as to regulate and maintain said [fol. 81] level and, consequently, the duty to carry out any acts necessary to keep such level.

It appears from the facts of this case that although there were some floods in El Anegado of Lajas prior to 1926, the same were not of the extent as the one now in question, and that the same lasted only a few months, while since the middle of 1926 and for over two years and up to the time in which the Commission decided this case, several thousand acres of land were still flooded, El Anegado and the lake constituting a single body of water, when they are two distinct bodies, although joined by the canal of La Angostura, through which the waters of the lake flow into El Anegado when they have a high level, all of this showing that it was the level of the lake, which was higher than the customary level of the water during the rainy season, that caused the flood. Neither the government nor the grantee or its successors have determined the level to which the franchise refers, but the natural and logical conclusion is that in view of the fact that Negro Pond is closed, the lake could not drain in the sea the excess of rain water, and this necessarily produced a level higher than the customary one during the rainy season and the continuous floods for several years of El Anegado of Lajas.

It is true that there is no evidence of any positive act on the part of the appellant to close Negro pond, but if the latter was closed, as it claims, by soil carried by the Loco River, it was in any event its duty to open the same in order that the waters of the lake might not produce, as they neces-

sarily produced when the outlet was closed, a level higher than the customary one, which produced the continuous flood of El Anegado. Consequently, we arrive at the conclusion that the order or decree of the Commission is reasonable and in accord with the law, inasmuch as appellant has failed to comply with the conditions of the franchise.

The judgment appealed from will be affirmed.

Pedro De Aldrey, Associate Justice.

[fol. 82] In Supreme Court of Puerto Rico

Judgment

San Juan, Puerto Rico, November 9, 1933.

For the reasons stated in the foregoing opinion the judgment appealed from rendered by the District Court of San Juan, June 4, 1930, is hereby affirmed.

It was so decreed by the court as witness the signature of the Chief Justice.

Mr. Justice Cordova Davila took no part in this ruling.

Emilio Del Toro, Chief Justice. Attest: Joaquin Lopez, Secretary-Reporter.

[Memorandum.—Petition for appeal and supersedeas, affidavit as to amount in controversy, order of December 28, 1933, allowing appeal, citation, issued January 2, 1934, and service thereof, supersedeas and cost bond and order of January 2, 1934, approving bond are here omitted.—A. I. Charron, Clerk.]

In Supreme Court of Puerto Rico

Assignment of Errors

Now come the plaintiffs-appellants herein, Horace Havemeyer, Frank A. Dillingham et al., as partners of the agricultural civil partnership Russell & Co., Sucrs., S. en C., and respectfully submit that in the record, proceedings, de-

cision and final judgment of the Supreme Court of Puerto Rico in the above-entitled case there is manifest error, to wit:

1. The Supreme Court of Puerto Rico erred in holding that the Public Service Commission of Puerto Rico had jurisdiction to cancel certain parts of franchise No. 5 granted by the Executive Council of Puerto Rico, March 19, 1901, to the Guanica Land Company, a private entity not connected in any way with the rendering of public service.

2. The Supreme Court of Puerto Rico erred in failing and refusing to hold that jurisdiction over franchise No. 5 [fol. 83] of March 19, 1901, granted to the Guanica Land Company (not a public company) lay exclusively with the Congress of the United States and/or with the Executive Council of Puerto Rico.

3. The Supreme Court of Puerto Rico erred in holding that clause 4 of franchise No. 5 granted to the Guanica Land Company by the Executive Council of Puerto Rico, March 19, 1901 imposed an affirmative obligation upon the grantee and its successors in right to regulate and control the level of Guanica Lake.

4. The Supreme Court of Puerto Rico erred in failing and refusing to hold that Russell & Co., Sucrs., S. en C., the successor of grantee of franchise No. 5, had complied with clause No. 4 of franchise No. 5 of March 19, 1901, in view of its other finding that Russell & Co. had done nothing to block the natural outlet of the lake and that the blocking of the outlet if it occurred was through the natural action of flood waters.

5. That court erred in failing and refusing to hold that its finding and the uncontradicted evidence submitted before the Public Service Commission to the effect that no standard or average high water mark was ever established by the Insular Government or by anyone by which clause 4 of franchise No. 5 could be judged, relieved the grantee and its successors of any positive duty to lower or raise the level of Lake Guanica.

6. The Supreme Court of Puerto Rico erred in holding that clause 4 of franchise No. 5 of March 19, 1901, neces-

sarily gave the grantee and its successors the control of the natural outlet of Lake Guanica to the sea.

7. The court erred in failing and refusing to hold that clause 4 of franchise No. 5 approved by the Executive Council of Puerto Rico, March 19, 1901, was a mere prohibitive clause, with which grantee and its successors have always strictly complied.

8. The court erred in holding that the order of cancellation of the water provisions of franchise No. 5, by the Publice Service Commission was reasonable, when the only penalty imposed by clause 4 of the franchise itself was the right of civil action given to abutting owners for damages caused by the undue raising or undue lowering of the waters of Guanica Lake.

[fol. 84] 9. The court erred in failing to hold that the order and decision of the Public Service Commission of Puerto Rico deprives Russell & Co., Sucrs., S. en C., of its property without due process of law in that the said order and decision arbitrarily and unreasonably imposed upon and read into the contractual franchise between the government of Puerto Rico and the owners of the franchise an affirmative duty to regulate and control the level of Guanica Lake.

10. The court erred in failing and refusing to hold that the reasonable interpretation of clause 4 of franchise No. 5 of March 19, 1901, merely forbade the grantee and its successors to erect dams or other obstructions which would result in raising the level of Lake Guanica above the usual level of the rainy season in ordinary years.

11. The Supreme Court of Puerto Rico erred in failing and refusing to hold that the Public Service Commission of Puerto Rico should have given an opportunity to the successors of the grantee of franchise No. 5 of March 19, 1901, to comply with the Public Service Commission's interpretation of clause 4 of the franchise before proceeding to the drastic remedy of cancellation.

12. The Supreme Court of Puerto Rico erred in not directing a modification of the order of the Public Service Commission giving successors of the grantee of franchise No. 5 of March 19, 1901, an opportunity to comply with the

interpretation put upon clause 4 of the franchise by the Public Service Commission of Puerto Rico and the District Court of San Juan, before depriving successors of grantee of a right of great value to them.

13. The Supreme Court erred in holding that the order of the Public Service Commission cancelling the franchise was reasonable when it does not appear from the record that appellants were given the opportunity to comply with the interpretation the Public Service Commission put upon clause 4 of franchise No. 5 of 1901 before resort was had to cancellation of a valuable right to take water, it appearing on the contrary that immediately upon receiving the interlocutory order of the Public Service Commission of [fol. 85] Puerto Rico to open the outlet of Lake Guanica appellants complied therewith.

14. The remedy is too drastic and unreasonable under the circumstances.

15. The judgment is contrary to law.

16. For other errors apparent in the record.

Wherefore plaintiffs-appellants pray that the judgment rendered by the Supreme Court of Puerto Rico on November 9, 1933, be reversed and set aside and for such other relief as may be proper.

San Juan, Puerto Rico, December 18, 1933.

Francis E. Neagle, R. Castro Fernandez, Attorneys for Plaintiffs-Appellants.

IN SUPREME COURT OF PUERTO RICO

STIPULATION AS TO RECORD ON APPEAL

The appellants and appellees through their undersigned attorneys respectfully stipulate and agree in accordance with Rule 14, subdivision 3, of the Rules of the United States Circuit Court of Appeals for the First Circuit and subject to the approval of this Honorable Court, that the record to be filed before the United States Circuit Court of Appeals for the First Circuit shall consist of the following portions of the record filed before this honorable tribunal, to wit:

1. Petition for appeal and its Exhibits A to H inclusive. (Supreme Court Record, pages 1 to 52, inc.)

2. Answer to the petition by the Public Service Commission. (Supreme Court Record, pages 93 to 98 inc.)

3. Answer to the petition by the Municipality of Lajas. (Supreme Court Record, pages 99 to 103 inc.)

4. Interlocutory order of the Public Service Commission dated December 17, 1928. (Supreme Court Record, pages 121 to 123, inc.)

[fol. 86] 5. Statement of the case and Opinion of the District Court of San Juan, P. R. (Supreme Court Record, pages 471 to 491, inc.)

6. Judgment of the District Court of San Juan, P. R. (Supreme Court Record, pages 491 to 494, inc.)

7. Notice of appeal filed in the District Court of San Juan, P. R. (Supreme Court Record, pages 495 and 496.)

8. Opinion of the Supreme Court of Puerto Rico.

9. Judgment of the Supreme Court of Puerto Rico.

10. Petition for appeal and supersedeas, affidavit of amount in controversy, assignment of errors, order allowing appeal and supersedeas, supersedeas bond and citation filed before the Supreme Court of Puerto Rico.

San Juan, P. R., January 9, 1934.

Francis E. Neagle, R. Castro Fernandez, Attorneys for Appellants. Benjamin J. Horton, Attorney General of Porto Rico; M. Rodriguez L. Serra, Assistant Attorney General, Attorneys for the Public Service Commission, Appellee. R. V. Perez Marchand, Attorney for the Municipality of Lajas, Appellee.

ORDER APPROVING STIPULATION

San Juan, Puerto Rico, January 20, 1934.

The above stipulation is hereby approved.

It was so ordered as witness the signature of the Chief Justice.

Emilio Del Toro, Chief Justice. Attest: Joaquin Lopez, Secretary-Reporter.

[fol. 87] Translator's Certificate omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] [Memorandum.—An order of enlargement of time for docketing case to, and including, March 13, 1934, is here omitted. A. I. Charron, Clerk.]

[fol. 89] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1934

No. 2905

HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs., S. en C.), Appellants,

v.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO ET AL., Appellees

Appeal from the Supreme Court of Puerto Rico

Before Bingham, Wilson and Anderson, JJ.

OPINION OF THE COURT—Filed January 10, 1935

WILSON, J.:

This is an appeal from a final judgment of the Supreme Court of Puerto Rico, affirming a judgment of the District Court of San Juan, dismissing an appeal by the appellants from an order of the Public Service Commission of Puerto Rico, and affirming the order of the Commission. This court has jurisdiction to review this case on either of two grounds: (1) that the construction of a United States statute, or (2) the necessary jurisdictional amount is involved. Municipality of Rio Piedras v. Serra, Gerabis & Co., Inc., 65 Fed. (2d) 691.

It is urged by counsel for the appellees that the individual appellants as members of the Sociedad en Comandita, Russell & Company, a form of limited partnership organized under the Code of Commerce of Puerto Rico

[fol. 90] (1930), Sec. 95, have no standing here as appellants, since the Supreme Court in People of Puerto Rico v. Russell & Company et al., 288 U. S. 476, held that it was a juridical entity, at least, for the purpose of giving the insular courts jurisdiction, it having its domicile in Puerto Rico. It is or no importance whether the individual members of Russell & Company are parties to this appeal.

The order to show cause was issued to "Russell & Company, S en C, a limited partnership." That company is here. Throughout the entire proceedings it has been designated as a civil agricultural partnership, or a limited partnership, as it appears it is, Secs. 125, 156 of the Commercial Code, Civil Code (1930) Sec. 1590, and every order and judgment has been against it in that capacity. It is too late now to raise the point. Russell & Company as a Sociedad en Comandita, having been proceeded against and consented to be treated in the proceedings as a civil agricultural partnership, we think it may be considered bound by whatever judgment may be rendered.

The facts found by the Supreme Court, briefly stated, are as follows: The Executive Council of Puerto Rico in 1901 granted to the Guanica Land Company, a New Jersey corporation, and its assigns, a franchise whereby it was authorized to take 20,000,000 gallons of water daily from Guanica Lake, but solely for the proper irrigation of lands owned or leased by it.

More particularly the franchise provides:

"I. That the Guanica Land Company, (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns, be and they are hereby authorized and empowered to erect, construct, maintain and operate a dam of masonry work or other proper materials across the Cano Negro, or outlet from the Lake of Guanica, in the Municipality of Yauco and upon such lands of abutting owners as may have been acquired by consent or by process of law, for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said Lake, through the said cano [fol. 91] or otherwise, for the purposes hereinafter set forth.

II. That the said Company and its successors and assigns be and they hereby are authorized to take from the said Lake of Guanica, or from the said cano or outlet, such quantity of water not exceeding 20,000,000 gallons during each day, as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased by the said Company, or by its successors or assigns, or any of them. The water so to be taken from the said lake or cano may be taken from such part or parts thereof, adjacent or contiguous to said lands, as the said Company or its successors or assigns may see fit, and may be taken by gravity through proper channels, or by pumps, or by any other method that may be advisable, or by any two or more of such methods.

III. That the said Company and its successors and assigns may erect, construct, operate and maintain upon those parts of the lands now or hereafter owned or leased by it or them, which lie within six meters of the bank of the said cano, or within twenty meters of the shore of the said lake or of the harbor or bay of Guanica, such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters; provided, that no public road lying within or partly within said limits shall be obstructed to any extent whatever thereby.

IV. That nothing herein contained shall be held or construed to authorize or permit the said Company or its successors or assigns to raise or maintain the level of the waters of said Lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said lake, or by unduly lowering the level of the waters of said lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie against said Company, its successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction."

It also authorized the Guanica Land Company to construct a private railroad for the transporting of its own products to a private wharf in Guanica Harbor, which it was authorized to construct, having first obtained permission of the Secretary of War.

[fol. 92] It appears in the record of the proceedings that at some time prior to 1917, the Guanica Land Company assigned the entire franchise to the Guanica Central, which afterward assigned it to the Ensenada Estates, Inc., which assigned to Russell & Company that part of the franchise authorizing the taking of 20,000,000 gallons of water daily from Guanica Lake; that is, "to be more specific, the rights contained under paragraphs I to IV, inclusive, of said franchise."

In 1929 the Municipality of Lajas in Puerto Rico adopted a resolution which it forwarded to the Public Service Commission of Puerto Rico, complaining that by reason of engineering work carried on in Negro Pond, which is the outlet of Guanica Lake, the lands and public roads in the Municipality of Lajas had been flooded for a long period of time. The Governor of Puerto Rico also called the attention of the Commission to the flooded condition of the lands in Lajas by forwarding a letter from the Commissioner of the Interior, in which it is claimed that the increased volume of water in the lake was due to a violation of the terms of the franchise granted to the Guanica Land Company in 1901.

Upon these complaints the Commission issued a show cause order to Russell & Company, the Ensenada Estates, Inc., and the Guanica Central, and any other person or legal entity having any rights in the above franchise, to appear and show cause why the franchise granted to the Guanica Land Company in 1901 should not be cancelled.

The South Porto Rican Sugar Company, a domestic corporation of Puerto Rico, apparently having acquired rights under the franchise to the railroad and wharf and Russell & Company as a Sociedad en Comandita, appeared specially and filed a motion to dismiss the proceedings before the Commission on the following grounds:

"1. That the Public Service Commission lacks jurisdiction over this case and that it does not have jurisdiction to cancel the franchise mentioned in the order to show cause issued by the Commission on May 26, 1928.

[fol. 93] 2. That none of the parties appearing in this cause is a public service corporation or a public service partnership, or is engaged in any manner in public service, and that this Commission does not have jurisdiction over these parties or over any one of them."

The motion was denied and, after hearing, the Commission issued its order that so much of the franchise issued to the Guanica Land Company which refers to the taking of water from Guanica Lake for purposes of irrigation should be cancelled, but to take effect nearly four months later. The order provided that in the meanwhile the parties in interest would be permitted to file further petitions requesting the Commission to fix the highest point at which the waters of Guanica Lake could be maintained by owners of the franchise, which, of course, they could not do without conceding the jurisdiction of the Commission, which they still deny.

From this order Russell & Company appealed to the District Court of San Juan, assigning as errors by the Commission: (1) that the Commission was without jurisdiction in the premises, since neither the Guanica Land Company nor the civil agricultural partnership, Russell & Company, was a public or quasi public corporation, and the franchise granted was entirely of a private nature and its amendment, modification or cancellation was not within the powers vested in the Commission under Sec. 38 of the Organic Act of 1917; (2) that the Commission erred in not holding that the floods in the valley of Lajas were caused by torrential and extraordinary rains, or a vis major; (3) that the Commission erred in holding that any work done by Russell & Company within the bed of the Rio Loco contributed to the height of the waters in Guanica Lake; (4) that the Commission erred in holding that Russell & Company was bound to know the natural level of the waters in the lake, above which they should not permit the waters of the lake to be raised, except in case of extraordinary rains. These and many other errors were assigned on appeal to the District Court of San Juan. The District Court, how- [fol. 94] ever, held that the issues before it on the appeal were confined to (1) whether the Commission had jurisdiction and authority to make the order cancelling so much of the franchise as related to the taking of water from Guanica Lake; (2) whether the order of the Commission was based on competent evidence; and (3) whether the order cancelling so much of the franchise as authorized the taking of water from the lake was reasonable.

The jurisdiction of the Commission, the District Court held, was established by the opinion of this court in South

Porto Rico Sugar Company et al v. Munoz et al., 28 Fed. (2d) 820, in which the South Porto Rico Sugar Company as one of the parties interested and appearing before the Commission, sought an injunction to restrain the Commission from acting on the complaint of the Municipality of Lajas at all.

The District Court of San Juan further held that, as the order of the Commission was presumptively reasonable, it must be sustained unless clearly shown to be unjust and unreasonable; and after a consideration of the evidence before the Commission, the District Court held that the order was both reasonable and in conformity to law.

From this judgment Russell & Company appealed to the Supreme Court of Puerto Rico, which affirmed the judgment of the District Court.

The assignments of error on the appeal to the Supreme Court of Puerto Rico are not printed in the record, but from the opinion of the court it appears that the same issues were raised in that court as were raised in the District Court, viz.: (1) that the Commission was without jurisdiction to order the cancellation of the franchise as to the water rights in Guanica Lake; (2) whether it was based on competent evidence; and (3) was reasonable.

The issue of jurisdiction was also disposed of in the Supreme Court as settled by the opinion of this court in South [fol. 95] Porto Rico Sugar Company et al. v. Munoz et al., supra. As no question was raised as to whether the order of the Commission was based on incompetent evidence, the Supreme Court held that the issues before it were limited to the reasonableness of the order, whether it was supported by the evidence and whether it was in conformity to law.

Before the Supreme Court, counsel for the appellants contended that neither Clause I nor Clause IV of the franchise granted to the Guanica Land Company imposed on the grantee the positive duty to maintain the waters of the Lake at or below a certain level, when it was provided in Clause I that it might construct a dam at the outlet of the Lake, and in Clause IV that nothing contained in the franchise should be construed to authorize or permit the grantee or its assigns to raise or maintain the waters of the lake above the customary level thereof during the rainy season; and contended that it had done nothing that would cause the

level of the waters of the lake to be raised above such customary level.

The Supreme Court, however, held that: "This clause (IV) not only prohibits the grantee from exceeding said level, but it also compels the same to avoid the waters of the lake from exceeding said level, for which reason this franchise necessarily gave to the grantee and its successors the management and control of Negro Pond so as to regulate and maintain said level, and consequently, the duty to carry out any acts necessary to keep such level."

While the Supreme Court found that there was no evidence that the appellants did any positive acts to close the outlet, it did hold that if the outlet to Guanica Lake had become closed by soil carried down by the Loco River, which it appears the Commission found that the appellants improved so as to produce a greater flow of water into Guanica Lake, it was the duty of the appellants to open the outlet in order to lower the level of the lake in times of excessive rains. [fol. 96] It concluded that the order of the Commission was reasonable and in conformity to the law.

It is from these rulings that the appeal was taken to this court. The assignments of error may be summarized under three groups:

(1) That the Commission was without jurisdiction and authority to make the order cancelling the franchise; (2) that the Supreme Court erred in construing Clause IV of the franchise as imposing on the appellants any affirmative duty to lower the flood waters of the lake, and (3) that the order cancelling the franchise was not reasonable.

The contention of the appellants as to the jurisdiction of the Public Service Commission is that that Commission had jurisdiction only over public service corporations; that Russell & Company is not a public service corporation and therefore the Commission was without jurisdiction or authority to cancel the franchise it held. The jurisdiction and authority of the Public Service Commission to cancel the franchise in question was raised at the very threshold of these proceedings, and was considered and passed upon by this court in South Porto Rico Sugar Co. et al. v. Munoz, 28 Fed. (2d) 820. We are content to abide by the decision there made as to the jurisdiction of the Commission.

In the Munoz case (in which Russell & Company, S en C, was also a party plaintiff and the Public Service Commission a party defendant), and apparently throughout this entire litigation, it was and has been assumed without question that the right to take waters from Guanica Lake and Cano Negro to the extent of 20,000,000 gallons per day, and to erect pumping stations and canals, and for that purpose acquire by eminent domain private lands, was of a public or quasi public nature and could not be exercised by Russell & Company in the absence of such a grant, either from the Executive Council or its successor, the Public Service Commission. This assumption was unqualifiedly approved in [fol. 97] the brief of the appellants filed in the Munoz case and also in this case, where counsel, in speaking of the irrigation franchise, stated that "the grantee (Russell & Company) could not make use of the water in question (except by prescriptive right), even though it owned the land on both sides of the Cano Negro and the Lake of Guanica, without getting a concession from the Government of Puerto Rico, for the waters of lakes and rivers are of the public domain (Law of Waters, Revised Statutes and Codes of Porto Rico, Section 2390, p. 459)"; that is, that the waters of Cano Negro and of Guanica Lake are public waters. This being so the grant of the right to take the waters now held by Russell & Company was a grant of a franchise of a public or quasi public nature within the meaning of Sec. 32 of the Foraker Act (31 Stat. p. 83), Sec. 3 of the Joint Resolution of Congress of May 1, 1900 (31 Stat. p. 715; Laws of Porto Rico, 1916, p. 17; and Secs. 38 and 39 of the Jones Act (39 Stat. p. 964); and this is so even though Russell & Company is not a public service corporation, for in the matter of holding back and taking waters from these sources, it is exercising a function of a public or quasi public nature.

If this were not so, the errors assigned and the questions argued as to the jurisdiction and power of the Public Service Commission to revoke the concession, or any of the other questions sought to be raised, would be purely academic and unworthy of any consideration, for neither the Executive Council nor the Public Service Commission would have authority to grant such a concession, and Russell & Company would have acquired nothing by the grant and there would be nothing to revoke.

This view of the question of the public nature of the grant is recognized in Sec. 52 of the Act of the Legislature of [fol. 98] Puerto Rico of December 6, 1917 (Act No. 70, Laws of Porto Rico, 1917, Vol. 2, p. 512), where it says:

"The commission shall have power to grant franchises, rights, privileges or concessions for public or quasi public purposes, including the right * * * to grant franchises, rights, privileges or concessions for the use of public waters for public or private purposes; * * *"

And in this aspect it is of no consequence whether Russell & Company is or is not a public service corporation.

Furthermore, the sentence in Sec. 38 of the Jones Act, out of which to a large extent this discussion arises—"The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council,"—does not refer to such executive functions as having been conferred by an Act of Congress over public service corporations, as neither the Foraker Act, nor the Joint Resolution, nor any law of Congress called to our attention, expressly conferred any such functions upon the Executive Council. While it may have related to the executive functions impliedly conferred on the Executive Council by the Joint Resolution of 1900, it may well have referred to the executive functions conferred on the Executive Council relating to public service corporations under the Act of March 12, 1908, entitled "An Act concerning the Regulation of Public Service Corporations in Porto Rico." See Revised Statutes and Codes of Porto Rico, pages 72-79, and particularly Secs. 3-10. Sec. 6 of that Act, as amended (Act of March 9, 1911, at p. 115) provides:

"Whenever in the case of any public service corporation operating under a grant of any character whatsoever, any power has been reserved to the government or to any official authority or public body, whether such government, public body or official now is in existence or exercises authority in the Island of Porto Rico or not, to exercise any supervision or control over said corporation or to approve of any tariff of charges, rule or regulation or condition or operation, or to amend, alter or repeal any such grant, then this power shall, on and after the date of passage of this act, be deemed [fol. 99] to be vested in the Executive Council; and said

Executive Council shall have all the powers heretofore so reserved to any government public body, or public official, and when, in such grant or grants, conditions have been imposed upon the grantee, and such conditions have not been faithfully observed or hereafter may not be faithfully observed, the Executive Council shall have power to annul or repeal said grant, or to take such other action as in its opinion is proper in respect to the matter, provided such conditions shall not have been fully complied with within the reasonable time allowed therefor."

It thus appears that in Sec. 38 of the Jones Act of March 2, 1917, Congress expressly recognized the power of the legislature of Puerto Rico to legislate with reference to the enforcement of a grant of a franchise for public service corporations; and, if the legislature of Puerto Rico had the right to enact such legislation, there can be little doubt but that it had authority to enact Sec. 60 of Act 70, of December 6, 1917, in which it was provided:

"Section 60—Violation of existing franchises—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council and is now in force; provided, however, that the (Public Service) commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law."

At least, Congress does not appear to have questioned it when the enactment of the law was reported to it.

And, inasmuch as the legislature of Puerto Rico, under the authority granted to it in the Organic Act (39 St. L. Sess. 25, 37) was authorized to enact legislation looking to the enforcement of the provisions of the Organic Act relating to franchises and not inconsistent therewith, whether the grantee thereof be an individual, a juridical entity, or a public service corporation, there can be no reasonable doubt as to the jurisdiction and authority of the Public Service Commission, at least, to alter or amend the franchise in question, when reasonable grounds are shown to exist, and that the amendment of March 4, 1927 [fol. 100] (c. 503, s. 6, 44 Stat. 1420) to Sec. 38 of the Organic Act of 1917, purporting to confer upon the legislature

power to enact such legislation, was enacted by Congress out of abundant caution.

We are of the opinion that, under the circumstances and upon the facts found by the Commission and accepted by the Supreme Court as a basis for its opinion, there was neglect on the part of the appellants to act when it became evident that the waters of the lake were being held up beyond the customary level by the conditions that had arisen in Negro Pond, over which they had control, especially when by their improvements in the Rio Loco a large quantity of silt and refuse, as the Commission found, was deposited at the outlet of the lake, and a greater volume of water was emptied in the lake in case of heavy rains than previously.

While they did not do any acts with the deliberate intent of holding back the waters of Guanica Lake above their natural level, they must, in 1926 or 1927, have been aware that, as a result of the accumlation of debris and sediment, an artificial dam had been raised at the outlet of the lake, and that the waters of the lake were thereby raised and maintained during the years 1927, 1928 and 1929 at a higher level than was customary following even unusual seasonal rains. With the knowledge of these facts, they permitted the artificial dam to remain, which accomplished the same purpose as a masonry dam created by their own acts. We think it was not unreasonable for the Supreme Court to find that the appellants had knowingly permitted the artificial dam thus created to remain, since they had control over Negro Pond and the outlet of the lake; and in thus permitting it to remain and to raise and keep the waters of the lake above the customary level, their action was unauthorized under the franchise granted to them, especially as they had by positive acts increased the flow of water, silt and refuse into the lake via the Loco River.

[fol. 101] Counsel for the Commission contends that the reasonableness of the order is not open for consideration by this court, although it is expressly made an issue before the insular courts under Sec. 85 of the Public Service Act of Puerto Rico. The cases cited by counsel are not in point, of which Keller et al., constituting the Public Utilities Commission of the District of Columbia v. Potomac Electric Power Company et al., 261 U. S. 428, is an example. In this case the District of Columbia courts were vested

with the power, after considering the order of the Commission, to amend it, to enlarge the valuations and to increase the rates established by the Commission. Obviously, a legislative power to fix rates was there vested in the court, and its acts in so doing were not judicial but legislative; and from its decision no appeal could lie to the Federal Supreme Court, which can only consider judicial questions.

The Public Service Act of Puerto Rico vests no legislative or executive powers in the insular courts under Sec. 85 of the Act. The District Court of San Juan on appeal has no power to change the order of the Commission. If it is not reasonable, or does not conform to the law, or is based on incompetent evidence, it can only reverse, or in its discretion remand, it to the Commission, which alone has the legislative or executive power to change it.

The Supreme Court in the case of Pacific Tel. & Tel. Co. v. Kuykendall, Director, etc., 265 U. S. 196, made clear this distinction. In that case two sections of the statutes of the state of Washington were involved, each differing in the powers vested in its court. Under Sec. 10428 (Comp. Stat. 1922) in case of an order of its Commission fixing rates, on appeal to the court for the purpose of having its reasonableness and lawfulness determined, the court could, as under the Puerto Rico Public Service Act, only affirm, reverse or remand. The court said, p. 200:

[fol. 102] "It is clear that the function to be performed by the Superior Court under this section is judicial. It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks to the reasonableness and lawfulness of the order of the Commission, and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. The court does not act legislatively."

While under Sec. 10441 of the Comp. Stat. (1922) of Washington, in fixing the valuation of utility properties, the state court is also made a part of the valuation tribunal and can pass on the weight of the evidence and set aside the valuation of the Commission and make a new one. In such case the Supreme Court said, p. 202:

"It is clear that the function of the courts in fixing the valuation of the property of the public utility is not confined to a judicial review of the work of the Commission."

It is clear, we think, that under the Public Service Act of Puerto Rico, the insular courts on appeal from the Puerto Rican Commission act judicially in determining whether its orders are reasonable, are in conformity with the law, and are based on competent evidence; and the same issues, on appeal from the Supreme Court of Puerto Rico, may be raised in this court.

Under the circumstances disclosed by the record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the lake would, in our opinion, be an arbitrary and unreasonable act, if it involved, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz: the right to take 20,000,000 gallons of water daily from Guanica Lake. See Shields v. Ohio, 95 U. S. 319; Berea College v. Kentucky, 211 U. S. 45, 57; Fair Haven & Westville R. R. Co. v. New Haven, 203 U. S. 379, 388; Com. of Inland Fisheries v. Holyoke Water Power Co., 13 Gray 239; Chicago, Milwaukee & St. Paul Ry. Co. v. State of Wisconsin, 238 U. S. 491. To avoid future damages from flowage of lands [fol. 103] in Lajas, it was only necessary to amend or modify the franchise by requiring the establishment of a gauge above which the waters should not be permitted to be raised by the owner of the franchise, except during periods of extraordinary rains, and for a period sufficient to permit the excessive waters to be reduced in due course to the height of the gauge so established. The appellants in their answer before the Commission set forth—without admitting any obligation so to do—that they had already taken proper steps to lower the waters of the lake, and to guarantee that in the future the waters would not go beyond the customary level. The establishing of a maximum height to which waters may be impounded is a comparatively simple thing to do, and a common requirement, where rights of flowage are obtained, and is in accord with the obvious spirit and intent of the grant in this case.

While it was, no doubt, with this in mind that the Commission postponed the taking effect of its order, which carried with it the implication that it would agree to an

amendment of the franchise requiring the waters of the lake to be maintained at or below a certain level, except during the periods of excessive rains, which alteration or amendment we think it had power to make; and while we cannot assume, notwithstanding the delay caused by the appeals, which we think were taken in good faith, that the Commission will not act in fairness to the appellants in allowing an amendment or modification of the franchise and grant a further extension of time in which they may file a petition requesting and consenting to an amendment to the franchise imposing a reasonable limitation on the height at which the waters of the lake may be maintained, we nevertheless think a proper procedure in this case will be to reverse the judgment of the Supreme Court. The Commission may then proceed upon the evidence before it, and upon further investigation, establish a reasonable limitation upon the height at which the waters of the lake may [fol. 104] be maintained, and amend the franchise of the appellants, so as to restrict their right to hold the waters back under normal conditions at a higher level than the height so fixed. From the record in this case it is apparent that the appellants and the Commission will be able to agree on a definite level to accomplish this purpose.

The judgment of the Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion, but without costs.

RECITAL AS TO HEARING

[fols. 105 & 106] On October 18, 1934, this cause came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the tenth day of January, A. D. 1935, the *the* opinion of the court (page 89) was filed, and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 10, 1935

This cause came on to be heard October 18, 1934, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now, to wit, January 10, 1935, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is reversed and the case is remanded for further proceedings not inconsistent with the opinion passed down this day, but without costs.

By the Court: Arthur I. Charron, Clerk.

RECITAL AS TO ISSUANCE OF MANDATE

Thereafter, to wit, on February 11, 1935, mandate issued to the Supreme Court of Puerto Rico.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI—Filed April 4, 1935

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of Sixty (60) days from April 10, 1935.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of April, 1935.

[File endorsement omitted.]

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,669. U. S. Circuit Court of Appeals, First Circuit. Term No, 115. The Public Service Commission of Puerto Rico, Petitioner, vs Horace Havemeyer, et al. Petition for a writ of certiorari and exhibit thereto. Filed June 8, 1935. File No. 115, O. T. 1935.